No. 22-125777-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

VICTOR JOEL CARDONA-RIVERA
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of
Lyon County, Kansas
The Honorable W Lee Fowler, District Judge
District Court Case No. 2021-CR-000366

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NATURE OF THE CASE

The defendant was charged with one count of aggravated burglary, one count of rape, one count of aggravated criminal sodomy, one count of aggravated assault, one count of criminal threat, two counts of aggravated battery, and one count of aggravated intimidation of a witness or victim. (R. I, 22-25). At the preliminary hearing, the State moved to add an additional count of rape and the court granted the motion. (R. I, 80-83; R. III, 41-42).

At the first jury trial, the jury found the defendant not guilty of one count of aggravated battery and was unable to reach a verdict on the remaining eight counts of the complaint. (R. I, 200-202; R. X, 50-51). The court declared a mistrial on the eight counts the jury was unable to reach a verdict on. (R. I, 200-202; R. X, 51). At a second jury trial, the jury convicted the defendant of one count of aggravated burglary, two counts of rape, one count of aggravated criminal sodomy, one count of criminal threat, and one count of aggravated battery. (R. I, 269-273; R. XVII, 42-43). The jury also found the defendant not guilty of one count of aggravated assault and one count of intimidation of a witness or victim. (R. I, 269-273; R. XVII, 42-43). The district court sentenced the defendant to a total term of incarceration of 310 months in the custody of the Kansas Department of Corrections. (R. I, 284-300; R. XVIII, 26). The defendant appeals his convictions. (R. I, 303).

STATEMENT OF ISSUES

ISSUE I: The two convictions for rape were not multiplicitous and should be affirmed.

ISSUE II: The district court did not err when it allowed the State to present the evidence that the defendant poked Y.A. with a knife.

STATEMENT OF FACTS

In September of 2021, Y.M. and her boyfriend, Antonio Alvarado, lived at 930 Graphic Arts, Lot 88, Emporia, KS, with their daughter Y.A. (R. XIII, 132). Both Y.M. and Antonio worked for U.S. Stone in Herington, KS. (R. XIII, 143). Y.M. worked Monday through Friday and also on Saturdays on rare occasions. (R. XIII, 143). Antonio worked Monday through Saturday. (R. XIII, 143).

On Saturday, September 4, 2021, Antonio went to work, leaving Y.M. and Y.A. asleep in their bedroom. (R. XIII, 154; R. XIV, 90-91). Around 6:00 in the morning, Y.M. woke up to a man in a ski mask over her on her bed. (R. XIII, 155-156). The man told Y.M. "Be quiet. Be quiet. Shut up, because you have a girl here. If you wake her up, I'm going to kill both of you." (R. XIII, 157). The man then turned Y.M. to face Y.A.'s crib and began to strangle her with his arm around her neck. (R. XIII, 158). Y.M. was unable to breath or speak when the man was strangling her. (R. XIII, 158-159). The man also had a knife that he rubbed the back of the blade across Y.M.'s neck. (R. XIII, 158-

160).

After the man let go of Y.M.'s neck, he pulled her to the side of the bed and told her to take off her panties. (R. XIII, 161-162). Y.M. told the man no but he pulled her panties down. (R. XIII, 163). The man then took his penis out of his pants and rubbed his penis from her anus to her vagina. (R. XIII, 164, 166-167). The man was unable to gain an erection because Y.M. was crying so much so he put his fingers inside Y.M.'s vagina. (R. XIII, 167). At this time, Y.A. woke up, and Y.M. pulled her towards her. (R. XIII, 169). Y.A. was crying for her mom. (R. XIII, 169). When Y.M. pulled Y.A. towards her, the man's fingers came out of her vagina, and he pulled Y.M. back to where she had been previously and reinserted his fingers in her vagina. (R. XIII, 169-170). While the man had his fingers in Y.M.'s vagina, she was crying and begging him to stop what he was doing, but he did not stop. (R. XIII, 171).

The man then had Y.M. sit up on her knees and told her to give him a blow job. (R. 172-173). He then sat Y.M. on the side of the bed and then he pulled her onto the floor by her hair. (R. XIII, 173). When she was pulled to the floor, Y.M. felt that the man had flip-flops on with socks. (R. XIII, 174). The man then sat Y.M. down on the bed again, like he had her prior to pulling her to the ground, and he pulled down his pants and had Y.M. give him oral sex. (R. XIII, 175-176). While she was sitting on the side of the bed giving the man oral

sex, the man was holding the knife to Y.M.'s throat and masturbating himself. (R. XIII, 175-176). The man eventually ejaculated onto the floor at the side of the bed. (R. XIII, 177).

After the man ejaculated, he put Y.M. back into the position she was in when he first put his fingers in her vagina, and again put his fingers in her vagina. (R. XIII, 177). Y.M. then asked the man to stop because what he was doing hurt, and she did not want him to do it. (R. XIII, 178). The man asked "Oh, are you very brave? Do you think I'm playing again?" and then he cut Y.M.'s left hand with the knife. (R. XIII, 178). The man then pulled his fingers out of Y.M.'s vagina and began strangling her again. (R. XIII, 182). Y.M. began to beg the man to stop what he was doing, but he refused to stop. (R. XIII, 182).

When the man eventually stopped his assault, he told Y.M. to swear on her daughter's life that she would not call the police or his gang would kill Y.M.'s parents in El Salvador. (R. XIII, 183). Then the man had Y.M. lay down on her stomach and told her to hold her "daughter for the last time." (R. XIII, 184). Y.M. attempted to look up to see the man, but the man saw and pushed her head to the other side. (R. XIII, 185). The man began going through things on some furniture that was in the bedroom. (R. XIII, 185-186). Y.M. asked the man to leave multiple times and eventually he did leave. (R.

XIII, 186). After she thought the man had left, Y.M. told her daughter that she was going to make a bottle of milk, and she went into the kitchen. (R. XIII, 186-187). When she got to the kitchen, Y.M. grabbed a knife to protect herself in case the man came back in. (R. XIII, 187-188).

Y.M. then called her boyfriend Antonio and her aunt and told each of them that a man had broken into the house, raped her, and said he was going to kill her. (R. XIII, 189-190). When talking with Antonio and her aunt, Y.M. was talking quietly because her voice was hoarse from being strangled and in case the man was still outside so he would not hear her on the phone. (R. XIII, 191).

While the man was assaulting Y.M., there were things about him that were familiar, and she was able to identify the man as Victor Cardona-Rivera, the defendant. (R. XIII, 191-192). Y.M. worked with the defendant at U.S. Stone and knew him to wear chains around his neck to work and flip-flops to and from work. (R. XIII, 192; R. XIV, 7-8). When the man was behind Y.M., she noticed he was wearing a chain around his neck. (R. XIII, 191; R. XIV, 25, 48). When Y.M. was thrown to the floor, she was able to feel the man's feet and could tell the man had flip-flops with socks on. (R. XIII, 192). Y.M. also recognized the defendant's voice from when she had lunch in the same room as the defendant. (R. XIII, 192; R. XIV, 4).

Y.M.'s aunt called the police, and the police responded to Y.M.'s house. (R. XIII, 190, R. XIV, 66, 126, 131). Officer McFaul took Y.M. and Y.A. to the police station to be interviewed. (R. XIV, 138-139). Since Y.M. spoke limited English and primarily Spanish, Officer McFaul called the LanguageLine to try to speak with Y.M. and get the details of what happened. (R. XIV, 140). In addition to calling the LanguageLine, Officer McFaul called Trooper Delgadillo to come to the police station to interview Y.M. since Trooper Delgadillo is fluent in Spanish. (R. XIV, 142-143). Trooper Delgadillo responded to the Emporia Police Department to assist in the interview of Y.M. (R. XV, 6). When he arrived, he went to the interview room and spoke with Y.M. (R. XV, 7). Y.M. recounted what happened to her to Trooper Delgadillo. (R. XV 8-14). After the interview with Trooper Delgadillo, Y.M. went to the hospital and had a sexual assault nurse examination (SANE) done. (R. XIV, 131-132, 144; XV, 14).

The following Tuesday, Y.M. again went to the police station to speak with detectives about what had happened to her. (R. XV, 36, 82). Sergeant Hernandez conducted the interview since he is fluent in Spanish, and Detective Davis and Investigator Ford were present. (R. XV, 82). Y.M. yet again recounted what happened to her and gave the details to officers. (R. XV, 82-83; R. XVI, 4-6; R. XIX, State's Exhibit 11).

While Y.M. was being interviewed, officers located the defendant and arrested him. (R. XV, 55). The defendant was taken to the police department to be interviewed. (R. XV, 55). As the defendant spoke mainly Spanish, Sergeant Hernandez conducted the interview with Detective Davis and Investigator Ford present. (R. XV, 82). During the interview, the defendant admitted to being at Y.M.'s house on Saturday morning. (R. XVI, 8; R. XIX, State's Exhibit 12 at 51:25-51:45). He claimed he had arranged with Y.M. to meet at her house on Saturday morning while her boyfriend and his wife were at work. (R. XIX, State's Exhibit 12 at 51:25-56:56). He claimed they had consensual sexual relations, and he did not have a knife or threaten Y.M. or Y.A. (R. XVI, 8; R. XIX, State's Exhibit 12 at 59:06-59:45, 1:00:05-1:01:28, 1:05:30-1:06:17, 1:06:57-1:08:46).

On September 9, 2021, the defendant was charged in a Complaint/Information with aggravated burglary, rape, aggravated criminal sodomy, aggravated assault, criminal threat, two counts of aggravated battery, and aggravated intimidation of a witness or victim. (R. I, 22-25). On December 2, 2021, a preliminary hearing was held, and the State moved to amend the complaint to add an additional charge of rape. (R. I, 80; R. III, 41). The Court granted the amendment and bound the defendant over on all counts. (R. I, 80-82; R. III, 42).

April 18, 2022, to April 21, 2022, a jury trial was held. (R. VII – R. X). At trial, Y.M. testified consistent with her prior statements to law enforcement and explained the events of the early morning of September 4, 2021. (R. VII, 172-206; R. VIII, 3-82). Y.M.'s boyfriend, aunt, and uncle testified to the phone calls they received from Y.M. that Saturday and what they did. (R. VII, 125-164). The State also presented the testimony of law enforcement officers and their investigation into the sexual assault. (R. VIII, 83-128, 173-193; R. IX, 3-17). SANE nurse, Diana Moore also testified to the injuries she observed during the SANE exam and how she conducted the exam, including collecting evidence through swabs. (R. VIII, 135-172).

Two Kansas Bureau of Investigation DNA analysts testified also. (R. IX, 17-64). Katelin Hollowell testified that she analyzed the swabs taken from the SANE kit and tested them for semen. (R. IX, 24-27). Stephanie Schotke then testified that she analyzed the evidence from the SANE kit for DNA, and the defendant's DNA was found on the labia minora swab taken during the SANE exam. (R. IX, 49). Following the close of the State's evidence, the defendant testified to his version of events. (R. IX, 67-93). The jury returned a verdict of not guilty on the aggravated battery count that Y.A. (the child) was the alleged victim of, but hung on the remaining eight counts of the complaint. (R. I, 200-202; R. X, 50-51).

The retrial was held August 1, 2022, through August 5, 2022. (R. XIII – R. XVII). Prior to trial, the State requested the court to allow the admission of testimony that the defendant had poked Y.A. with a knife during the assault of Y.M. (R. XI, 214-217; R. XIII, 9-10). The court granted the request over the defendant's objection. (R. XIII, 10-12). During the trial, the State presented its case similar to the first trial, but in the second trial, the State had the defendant's testimony from the first trial read into the record and the defendant's interview with law enforcement was admitted into evidence. (R. XIII, 131 – R. XVI, 219; R. XIX, State's Exhibit 12). The jury convicted the defendant of one count of aggravated burglary, two counts of rape, one count of aggravated criminal sodomy, one count of criminal threat, and one count of aggravated battery; and acquitted him of one count of aggravated assault and one count of intimidation of a witness or victim. (R. I, 269-273; R. XVII, 42-43). The district court sentenced the defendant to a total term of incarceration of 310 months in the custody of the Kansas Department of Corrections. (R. I, 284-300; R. XVIII, 26).

ARGUMENTS AND AUTHORITES

ISSUE I: The two convictions for rape were not multiplicitous and should be affirmed.

The evidence shows that there was a fresh impulse for the two rape convictions. Therefore, this Court should find that the counts were not

multiplicitous.

The Double Jeopardy Clause of the Fifth Amendment "protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *State v. Schoonover*, 281 Kan. 453, 463, 133 P.3d 48 (2006).

Discrete and Separate Acts or Courses of Conduct vs. Unitary Conduct

The first layer of this test requires this Court to examine the facts to determine whether the charges arise from "discrete and separate acts or courses of conduct" or unitary conduct arising from "the same act or transaction" or a "single course of conduct." Double jeopardy concerns only arise if unitary conduct is at issue. *Schoonover*, 281 Kan. at 464.

Courts generally consider four factors when determining whether convictions arise from the same or "unitary" conduct:

> (1) Did the acts occur at or near the same time?
> (2) Did the acts occur at the same location?
> (3) Is there a causal relationship between the acts or was there an intervening event?
> (4) Did a fresh impulse motivate some of the conduct?

Schoonover, 281 Kan. at 497. It is recognized that a double jeopardy issue is not raised when a defendant is charged, tried, and sentenced for discrete and separate acts or courses of conduct. *Id*. at 464. Rather, the issue arises

when the conduct is unitary, arising from what is usually referred to as "the same act or transaction." *Id*. at 464; e.g., *Blockburger v. U.S*., 284 U.S. 299, 304, 52 S. Ct. 180 (1932).

The second layer focuses upon the issue of whether the prosecution is for the same offense and divides the analysis into two categories. *Schoonover*, 281 Kan. at 464. The first category looks to if the defendant was charged with violations of multiple statutes that may or may not be deemed the same for double jeopardy purposes. *Id*. These are called "multiple description cases." *Id*. The second category looks to whether the defendant was charged with multiple violations of the same statute. *Id*. The sole issue in these cases is identification of the "allowable unit of prosecution." *Id*. citing *U.S. v. Universal C.I.T. Credit Corp*., 344 U.S. 218, 221, 73 S. Ct. 227 (1952).

Schoonover Test Step 1: The convictions did not arise from the same conduct.

When looking to the four factors to determine whether the convictions arose from the same or "unitary" conduct, this Court should find that the convictions did not arise from the same conduct.

The Kansas Supreme Court has considered the question of multiplicity many times in sexual assault cases. In *State v. Dorsey*, 224 Kan. 152, 156, 578 P.2d 261 (1978), the Court held that multiple acts of attempted rape over the course of about 45 minutes resulted in only one count of rape. But

subsequent decisions have reached different results. See *State v. Richmond*, 250 Kan. 375, 378-79, 827 P.2d 743 (1992) (distinguishing *Dorsey*, holding two counts of rape not multiplicitous despite time frame similar to that in *Dorsey*); *State v. Zamora*, 247 Kan. 684, 693-94, 697-98, 83 P.2d 568 (1990) (two rape charges not multiplicitous when digital penetration preceded intercourse); *State v. Howard*, 243 Kan. 699, 703-04, 763 P.2d 607 (1988) (multiple counts of rape, sodomy not multiplicitous when occurring over span of 90 minutes to 3 hours; when separate, distinct; when occurring in different locations in house; when separated from each other by other sex acts); *State v. Wood*, 235 Kan. 915, 920, 686 P.2d 128 (1984) (incidents of sexual intercourse separate, distinct when separated by 2 to 3 hours).

However, this Court has found that "[c]onduct is not unitary when sex acts are 'separated from each other by other sexual acts.'" *State v. Butler*, No. 123,742, 2022 WL 3692866, *14 (Kan. App. 2022) (unpublished opinion) (petition for review granted on a different issue) (citing *State v. Howard*, 243 Kan. 699, 703, 763 P.2d 607 [1988]). See also *State v. Martin*, No. 107,602, 2013 WL 5422310, *7 (Kan. App. 2013) (unpublished opinion). In the present case, it is clear from the evidence that the two rape charges in question both occurred on or about September 4, 2021. (R. XIII, 155). It was testified to that the assault took place around 6:00 a.m. and the assault lasted approximately

20 minutes. (R. XIV, 107, 289; R. XV, 14). The sexual acts all occurred at Y.M.'s home in her bedroom. (R. XIII, 155-186). Both sex crimes were separated from each other by another sex crime. (R. XIII, 173-177). Count 2 – charging the defendant with rape for rubbing his penis from Y.M.'s anus to vagina and penetrating her with his fingers, and Count 9 – charging the defendant for rape for penetrating Y.M. with his fingers – were separated in time and evidence through the testimony of Y.M. by Count 3 – aggravated criminal sodomy by the defendant forcing Y.M. to give him oral sex. (R. XIII, 173-177). Because these two sex crimes are separated by another sex crime, they cannot be multiplicitous. *State v. Howard*, 243 Kan. at 703.

Moreover, as it relates to the last two factors in the four-factor test in determining if the convictions arose from the same or "unitary" conduct, the State argues that there was a fresh impulse that motivated the conduct and that there were intervening events, i.e., a different sex crime occurring.

The defendant was charged with rape in Count 2 for when he rubbed his penis from Y.M.'s anus to her vagina and put his fingers in her vagina after he was unable to get an erection. (R. XIII, 164, 166-167). The defendant was charged in Count 9 with rape for when he pulled Y.M. back to the side of the bed after he ejaculated and forced his fingers into her vagina again. (R. XIII, 177). By ejaculating, the defendant completed the sex act and then began

a new sex act when he forced his fingers in Y.M.'s vagina a second time. In looking at the specific facts of the case and the way the assault happened, it is clear that there was a fresh impulse between each act, in addition to there being an intervening criminal act between the rapes.

The defendant has cited to *State v. Aguilera*, No. 103,575, 2011 WL 2555423 (Kan. App. 2011) (unpublished opinion), to support the argument that counts 2 and 9 are multiplicitous. However, the State asserts that the Court should follow the ruling in *State v. Butler* as *State v. Aguilera* was wrongly decided, and panels of this Court can disagree. *State v. Urban*, 291 Kan. 214, 223, 239 P.3d 837 (2010). The Court found in *Butler* that the order of events shows whether there is one continuous crime or multiple crimes. 2022 WL 3692866, at *14. Similar to this case, *Butler* was charged with three counts of rape and two counts of aggravated criminal sodomy. *Id.* at *5. Each of the rape counts was separated by the aggravated criminal sodomy counts, and the aggravated criminal sodomy counts were separated by a rape count. *Id.* at *5. The *Butler* Court found that

> The crimes of rape and aggravated criminal sodomy do not have an identity of elements. See *Colston*, 290 Kan. at 972 (comparing elements of rape and aggravated indecent liberties with a child). Rape requires sexual intercourse, meaning penetration of the female sex organ. K.S.A. 2018 Supp. 21-5501(a); K.S.A. 2018 Supp. 21-5503. Aggravated criminal sodomy requires sodomy, meaning oral contact with or penetration of

> the genitalia, or anal penetration, or oral or anal copulation or sexual intercourse with an animal. K.S.A. 2018 Supp. 21-5501(b); K.S.A. 2018 Supp. 21-5504. Rape must include penetration of the female sex organ and aggravated criminal sodomy must not.

Butler, 2022 WL 3692866, at *14. Therefore, as the rapes were each separated by an aggravated criminal sodomy, the rapes were not multiplicitous, and the aggravated criminal sodomy counts were not multiplicitous. *Id.* at *15.

This Court should follow the reasoning in *Butler* and find the rapes in this case were not multiplicitous because there was an intervening event of another sex crime that separated them. However, if this Court finds that the defendant's conduct was unitary – meaning that the multiple crimes committed over the course of the 20 minutes coupled with the fresh impulse as evidenced in the trial by Y.M.'s testimony were not discrete and separate acts, then it would likely be found that the rape counts in counts 2 and 9 would be multiplicitous.

ISSUE II: The district court did not err when it allowed the State to present the evidence that the defendant poked Y.A. with a knife.

K.S.A. 60-455 and Res Gestae

The defendant argues that the evidence of the defendant poking Y.A. with a knife was erroneously admitted because K.S.A. 60-455 did not apply to the evidence, and the evidence could not have been independently admitted as res gestae evidence. (Appellant's Brief, 20). "When the

adequacy of the legal basis of a district judge's decision on admission or exclusion of evidence is questioned, [appellate courts] review the decision de novo." *State v. Gunby*, 282 Kan. 39, 47-48, 144 P.3d 647 (2006) (emphasis in original).

The State concedes that the evidence of the defendant poking Y.A. with a knife was not admissible under K.S.A. 60-455 as it was part of the events of the crimes the defendant was being tried for, and not from "another specified occasion." K.S.A. 60-455 states in pertinent part that "evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion." K.S.A. 60-455(a). The Kansas Supreme Court has held that "K.S.A. 60-455 does not apply if the evidence relates to crimes or civil wrongs committed as part of the events surrounding the crimes for which [a defendant is] on trial–that is, the res gestae of the crime." *State v. King*, 297 Kan. 955, 964, 305 P.3d 641 (2013).

> [I]t has long been held that evidence of other crimes may be admissible independent of 60–455 when such evidence is that of the acts done or declarations made before, during, or after the happening of the principal occurrence where those acts are so closely convicted to the principal occurrence as to become in reality part of it. Admission of such evidence is governed by the rules of evidence set out in Article 4, chapter 60, of the

Kansas Statutes Annotated

State v. Mims, 264 Kan. 506, 511, 956 P.2d 1337 (1998). In *State v. Gunby*, the Kansas Supreme Court

> "eliminated res gestae as an independent basis for the admission of evidence. It did not eliminate the admission of evidence of events surrounding a commission of the crime under the applicable rules of evidence." In other words, if a rule of evidence prohibits the admission of evidence, res gestae evidence does not become admissible simply because it establishes the circumstances surrounding the criminal act or civil wrong. On the other hand, res gestae evidence is not automatically inadmissible; rather, if the evidence is relevant it can be admitted unless a rule of evidence prevents its admission.

King, 297 Kan. at 964.

"Generally, when considering a challenge to a district judge's admission of evidence, an appellate court must first consider relevance. Unless prohibited by statute, constitutional provision, or court decision, all relevant evidence is admissible. K.S.A. 60–407(f)." *Gunby*, 282 Kan. at 47. Under K.S.A. 60-401(b), evidence must be both material and probative to be relevant. "Materiality requires that the fact proved be significant under the substantive law of the case and properly at issue." *State v. Faulkner*, 220 Kan. 153, 156, 551 P.2d 1247 (1976). "Probative evidence requires only a logical connection between the asserted fact and the inference it is intended to

establish." *State v. Robinson*, 306 Kan. 431, 436, 394 P.3d 868, 874 (2017). "Once relevance is established, evidentiary rules governing admission and exclusion may be applied either as a matter of law or in the exercise of the district judge's discretion, depending on the contours of the rule in question." *Gunby*, 282 Kan. at 47. "On appeal, the question of whether evidence is probative is judged under an abuse of discretion standard; materiality is judged under a de novo standard." *State v. Shadden*, 290 Kan. 803, 817, 235 P.3d 436 (2010).

> Judicial discretion is abused if judicial action is: (1) arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. *Fischer v. State*, 296 Kan. 808, Syl. ¶ 8, 295 P.3d 560 (2013).

State v. Woods, 301 Kan. 852, 861, 348 P.3d 583 (2015). After establishing relevance, it must be determined whether the probative value outweighs the prejudicial effect of the evidence. *State v. Reid*, 286 Kan. 494, 512, 186 P.3d 713 (2008). The appellate courts review this under an abuse of discretion standard. *Id*.

In this case, the evidence that the defendant poked Y.A. with a knife was both material and probative thus it was relevant. This evidence was not

admitted to show that the defendant actually poked Y.A. with a knife, it was admitted to show that the defendant threatened harm to Y.A. with a knife to force Y.M. to comply with his demands. In order to prove the crimes of rape and aggravated criminal sodomy, the State had to prove that, during the sexual assaults, Y.M. was overcome by force or fear. (R. I, 242, 243, 248). In order to prove the crime of criminal threat, the State had to prove that the defendant had made a threat of violence and that the threat was intended to place Y.M. in fear. (R. I, 245). Additionally, to prove the crime of aggravated intimidation of a witness or victim, the State had to prove that the defendant made a threat of violence either against Y.M. or another person. (R. I, 247). The fact that a threat was made to harm Y.A., Y.M.'s daughter, with a knife was material and probative to all of these five charges as the State had to prove Y.M. was overcome by force or fear and that a threat of violence was made by the defendant. There were not any statutes, constitutional provisions, or court decisions that prohibited the admission of the evidence. Additionally, the probative value of the evidence greatly outweighed the prejudicial effect. The district court did not abuse its discretion in admitting the evidence because the court's ruling was not arbitrary, fanciful, or unreasonable; the ruling was not based on an error of law; and was not based on an error of fact. Therefore, the district court did

not err in admitting evidence of the defendant poking Y.A. with a knife to establish that Y.M. was overcome by force or fear and that the defendant had made a threat of violence.

Failure to Give Limiting Instruction

The defendant argues that the district court erred by admitting the evidence of the defendant poking Y.A. with a knife and not giving the jury a limiting instruction. (Appellant's Brief, 20). However, the defendant's argument fails because no limiting instruction was required as the evidence was not admitted under K.S.A. 60-455. Further, as K.S.A. 60-455 was not even applicable to the evidence because the evidence was res gestae, no limiting instruction was required. *State v. Sieg*, 315 Kan. 526, 540-541, 509 P.3d 535 (2022). A limiting instruction would have only been required if K.S.A. 60-455 applied. *Id*.

Collateral Estoppel and Double Jeopardy

The defendant argues that the collateral estoppel doctrine barred the admission of evidence of the defendant poking Y.A. with a knife. (Appellant's Brief, 20). In *Yeager v. United States*, 557 U.S. 110, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009), the United States Supreme Court discussed the application of the collateral estoppel doctrine as embodied in the Fifth Amendment's protection against double jeopardy. The Court reaffirmed the

rule laid out in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), that in order to determine if double jeopardy was violated the reviewing court must " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter[s], and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Yeager*, 557 U.S. at 120. The Court then went on to hold that when a jury verdict that necessarily decides a critical issue of ultimate fact, that verdict protects the defendant from further prosecution for any charge for which that fact is an essential element. *Yeager*, 557 U.S. at 123.

This language makes it clear that double jeopardy can only be found if the court must find that a "rational jury" could not have acquitted on the first charge without finding in the defendant's favor on a factual issue that the State needed to prove in order to convict him of any of the charges that the first jury hung on. Furthermore, it is the defendant who bears the burden of showing that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United* States, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

The State did not need to prove that "[t]he defendant knowingly caused physical contact with Y.A. in a rude, insulting or angry manner with a

deadly weapon [ ], or in any manner whereby great bodily harm, disfigurement or death [could have been] inflicted" in order to prove any of the eight charges he was tried for in the second trial. (R. I, 241-248). For rape and aggravated criminal sodomy, the State had to prove that "Y.M. was overcome by force or fear." (R. I, 242, 243, 248). For criminal threat, the State had to prove that "[t]he defendant threatened to commit violence and communicated the threat with the intent to place [Y.M.] in fear." (R. I, 245). For aggravated intimidation of a witness or victim, the State had to prove that there was "an expressed or implied threat of violence or force against the victim and/or other person." (R. I, 247). The charges of aggravated burglary, aggravated assault, and aggravated battery of Y.M. did not have any elements that the defendant poking Y.A. with a knife would apply to. (R. I, 241, 244, 246). The jury's acquittal of the defendant did not find he did not use a knife to threaten Y.A., it merely found that the knife did not make physical contact with Y.A.

This Court has addressed a similar issue in *Anthony v. State*, No. 103,572, 2011 WL 2555421 (Kan. App. 2011) (unpublished opinion). In *Anthony*, the defendant argued that he could not be tried for murder a third time after a jury in a second trial had found him not guilty of theft and aggravated burglary. *Anthony*, 2011 WL 2555421, at *2. He contended that the acquittals

were tantamount to the jury finding that he was not at the murder scene. *Id*. The Court found that the jury's verdict merely found that Anthony had not been inside the victim's residence, not that he was not present at the scene. *Id.* The panel cited to the Kansas codification of double jeopardy:

> K.S.A. 2011 Supp. 21-5110(b)(2) (formerly K.S.A. 21-3108[2][b]), which provides that a prosecution is barred if the defendant was previously prosecuted for another crime and that trial ended in an acquittal that ' "required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution' " See *State v. Schroeder*, 279 Kan. 104, 116, 105 P.3d 1237 (2005).

Anthony, 2011 WL 2555421, at *1. The Court went on to state:

> The jury could have acquitted Anthony on the burglary and theft charges for a variety of reasons. But acquittal on that charge did not, in the words of our statute codifying the part of the double-jeopardy rule relevant to Anthony's case, "require[ ] a determination inconsistent with any fact necessary to a conviction" in the murder case. So there was no double-jeopardy bar at the third trial on the murder charge.

Anthony, 2011 WL 2555421, at *3.

Much like in *Anthony*, the jury in the defendant's first trial in this case could have found him not guilty for the aggravated battery of Y.A. for a variety of reasons. However, the acquittal was not a finding that the defendant had not threatened Y.A. with a knife, or even without a knife. Therefore, the acquittal did not "require [ ] a determination inconsistent with

any fact necessary to a conviction" on any of the eight charges the defendant was tried for in the second trial. Thus, double jeopardy was not violated by the admission of the evidence of the defendant poking Y.A. with a knife.

Harmless Error

If the Court finds the evidence was admitted in violation of the Double Jeopardy Clause of the Fifth Amendment, the State argues that the admission of the evidence was harmless.

> Error in the admission or exclusion of evidence in violation of a constitutional or statutory right of a party is governed by the federal constitutional error rule. An error of constitutional magnitude is serious and may not be held to be harmless unless the appellate court is willing to declare a belief that the error is harmless. Before an appellate court may declare such an error harmless, the court must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial. Where the evidence of guilt is of such direct and overwhelming nature that it can be said that evidence erroneously admitted or excluded in violation of a constitutional or statutory right could not have affected the result of the trial, such admission or exclusion is harmless.

State v. Sanders, 258 Kan. 409, 418–19, 904 P.2d 951 (1995).

In the case at bar, the only evidence admitted about the defendant poking Y.A. with a knife was through limited testimony of Y.M. and in the video of Y.M.'s interview with officers. During testimony, it was only brought up in

three questions and answers during direct examination of Y.M.:

> Prosecutor: And what did he do?
>
> Y.M.: Well, at that point, I was mad. I was, like, mad because it was hurting me. And he grabbed the knife and put it on my daughter's back - - on the girl's back like, you know, like pushing her with the knife, like.
>
> Prosecutor: Do you know where the knife had been prior to him touching [Y.A.] with the knife?
>
> Y.M.: No, I don't remember.
>
> Prosecutor: Then, after he poked [Y.A.] in the back with the knife, what happened?
>
> Y.M.: He put me on my knees.

(R. XIII, 172). This exchange takes up 12 lines, or approximately half of one page, of the transcript that has approximately 140 pages of testimony of Y.M. (R. XIII, 131-93; XIV, 3-81). In the video of Y.M.'s interview, there were two separate exchanges where the defendant poking Y.A. with a knife was referenced. The first was approximately 8:45 into the video and lasted for approximately 38 seconds.

> Y.M.: *Describing in Spanish.*
>
> Sergeant Hernandez: *Clarifies in Spanish.*
>
> Y.M.: *Answers in Spanish.*

Sergeant Hernandez: *Clarifies in Spanish.*

Y.M.: *Nods*

Sergeant Hernandez: So, that's when, I already said her daughter woke up right? Uh, she called for her daughter to come to her side, and she held her and that's when he started poking his daughter, or her daughter's back with the knife.

(R. XIX, State's Exhibit 11 at 8:45-9:23). The second was approximately 28:32 into the video and lasted for approximately 21 seconds.

Detective Davis: Umm, when your daughter, when, when he was poking your daughter with the knife, did she get any injuries? Have you seen anything after that, any cuts?

Sergeant Hernandez: *Translates in Spanish.*

Y.M.: *Answers in Spanish.*

Sergeant Hernandez: No injuries, just very scared.

(R. XIX, State's Exhibit 11 at 28:32-28:53). Both of these exchanges added up to approximately 59 seconds of a 32-minute interview that was presented to the jury during Sergeant Hernandez's testimony. (R. XV, 435; R. XIX, State's Exhibit 11). No other testimony or evidence was presented on these statements made by Y.M. (R. XIV, 277 – R. XVI, 657). There was also no mention of the defendant poking Y.A. with a knife during the State's opening statement or closing argument. (R. XIII, 121-128; R. XVII, 3-17, 27-37). Therefore,

the evidence of the defendant poking Y.A. with a knife was extremely limited when viewed in the context of all of the testimony and evidence that was presented to the jury over the four days that evidence was presented.

While there was extremely limited evidence presented of the defendant poking Y.A. with a knife, there was significant testimony about the defendant using a knife against Y.M., making threats against Y.M., and making threats against Y.A. (R. XIII, 157-160, 175-176, 178, 182, 183; R. XIV, 25-26, 33, 47-48, 51-52, 66, 72, 94, 98, 141, 149; R, XV, 10, 13, 49, 52-54; R. XVI, 19, 26, 120-121, 151; R. XIX, State's Exhibit 11). When viewing the record as a whole, it is clear that the admission of the evidence regarding the defendant poking Y.A. with a knife had little, if any, likelihood of the evidence changing the jury's verdict. There was overwhelming evidence presented to the jury of threats made by the defendant during the sexual assault of Y.M. The fact that the jury acquitted the defendant of the aggravated assault and aggravated intimidation of a witness or victim charges is irrelevant to whether the evidence for the charges the defendant was convicted of was overwhelming. The evidence of the defendant poking Y.A. with the knife was irrelevant to the charge of aggravated assault and there could be numerous explanations as to why the jury acquitted the defendant of the aggravated intimidation of a witness or victim but convicted him of the other six charges.

In order to have convicted the defendant of four of the six charges he was convicted of, the jury had to find that Y.M. was overcome by force or fear and a threat of violence was made to place Y.M. in fear. If the evidence was admitted in error, the error was harmless as there was more than enough evidence presented for the Court to declare beyond a reasonable doubt that the admission of the evidence had little, if any, likelihood of changing the result of the trial.

CONCLUSION

Based upon the above arguments and authorities, the State of Kansas, Plaintiff-Appellee herein, respectfully requests this Court affirm Cardona-Rivera's convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certifies that the foregoing was filed electronically on this 17th day of July, 2023, with the Court of Appeals for the State of Kansas, and a true and correct copy was served on the following by EMAIL:

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515 P.3d 754 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Richard Chantez BUTLER, Appellant.

No. 123,742
|
Opinion filed August 26, 2022.

Appeal from Atchison District Court; ROBERT J. BEDNAR, judge.

Attorneys and Law Firms

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Sherri L. Becker, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Green, P.J., Schroeder and Cline, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Richard Chantez Butler appeals from his 15 convictions and sentence related to raping his ex-girlfriend. He argues that a charge of aggravated kidnapping was not supported by sufficient evidence. He asserts that three convictions of rape and two convictions of aggravated criminal sodomy are multiplicitous. He contends that the State committed prosecutorial error during closing argument. He argues that the trial court erred in denying his motion for a new trial. And he asserts that the trial court violated his right to a jury trial when it included prior convictions in calculating his prison sentence. For the reasons set forth below, we affirm in part, reverse in part, and vacate in part.

FACTS

Butler and L.K.'s relationship

L.K. testified at trial that she and Butler were in a relationship for roughly two years and five months, with Butler moving into her residence around Thanksgiving of 2018. Butler threatened, raped, and sodomized her in her home on May 11, 2019. L.K. testified that in the months leading up to the incident, the relationship was very dysfunctional.

L.K. supplemented her income by selling LuLaRoe products. She and Butler talked about her no longer selling LuLaRoe and instead Butler would help with household bills when he moved in. Because Butler did not have a phone or a car, L.K. gave him a cell phone, paid for his cell service, and arranged for Butler to borrow an old pickup truck from a friend. Butler started working part time at a small business owned by one of L.K.'s friends. But financial stress put a strain on the relationship.

In January 2019, Butler started working the 4:30 p.m. to 2:30 a.m. shift at a local pipe plant. Butler told L.K. that he did not want to work that shift because "things can happen if you're on that kind of shift and that is when women cheat for sure." After Butler began this job, L.K. started seeing a change in his behavior. While Butler was working the night shift at the pipe plant, he would repeatedly call L.K. demanding to know if she was alone and requiring her to show him around the house on FaceTime to prove that she was alone. L.K. testified that Butler would call 95 times a night. Butler demanded screenshots from L.K.'s phone to prove who she was talking to in between his phone calls. L.K. testified that she knew the relationship was getting to a level that was not going to work.

By March 2019, Butler was contributing to the household income, but L.K. testified that the financial strain continued. L.K. decided to downsize by selling her house to her daughter and buying her daughter's smaller house. Butler objected to this plan.

Sudden trip to Kansas City

On May 7, 2019, Butler told L.K., "I'm leaving for Kansas City, I need to go to a funeral, I'm taking the car, and I'm spending the night there." Butler might have called L.K. one time, which seemed odd to L.K. because they typically knew each other's whereabouts. L.K. began to suspect that Butler was cheating.

While Butler was in Kansas City, L.K.'s suspicion prompted her to look through the AT&T phone records. L.K. found a woman's phone number that Butler had been repeatedly calling and texting, up to 105 times a day. Because L.K. found

evidence of what she believed was infidelity, she called a local locksmith to have the locks changed on the house. L.K. then told Butler that their relationship was over, that she changed the locks, and that he was not going to have a place to come home to. L.K. packed Butler's belongings, left them at his part-time job, and told him that the friend wanted the truck back. L.K. also demanded the cell phone back and Butler said no. L.K. called AT&T and reported the phone stolen to have service disconnected.

***2** L.K. testified that Butler did not stay at her house in Atchison that night. L.K. believed that Butler was staying in a house on U Street. Butler did not complain about not having a place to stay, nor did he try coming back to the house uninvited.

Cricket store confrontation

After Butler returned from Kansas City, L.K. drove past a Cricket store and saw Butler's truck in the parking lot. L.K. assumed that Butler was trying to activate service on the phone that she had given him. She went inside the store and took the phone from him. At trial, the Cricket store manager testified that L.K. was "irate," loud, waving her hands, and "clearly was looking for an issue." Butler remained calm and did not engage L.K., but instead he apologized repeatedly to the store employees. L.K. called the police, and Butler went outside to wait for the police. The police told L.K. that she gave him the phone to use so it was not stolen and the conflict over the phone was "a civil issue."

Dinner at Paolucci's

On May 10, 2019, L.K. received a text from Butler asking if they could "just go out tonight and have tacos and margaritas." One of L.K.'s friends was celebrating her husband's birthday and invited L.K. to join her and her husband at a restaurant called Paolucci's. L.K. wanted to "keep a strong level of peace" because Butler remained in Atchison and she wanted "to keep things just as calm and copacetic as I could between us so that when we would see each other in Atchison, there wouldn't be any kind of problems." Butler asked to come over to L.K.'s house to shower before dinner. L.K. allowed him to come over to shower but made clear that he was not coming back to the house to stay, and that the relationship was over. Although they agreed that the relationship was over, Butler offered to pay for L.K.'s meal and L.K. accepted.

L.K. drove Butler to Paolucci's with her. L.K. and Butler stayed at Paolucci's after L.K.'s friends left and enjoyed some drinks on the deck. L.K. testified that an employee, a bouncer named Dawaun Bailey, sat down at their table and chatted briefly with L.K. and Butler. L.K. did not know Bailey's real name, only that he goes by "D Boy." Bailey testified at trial that there was nothing unusual about L.K. and Butler's group —he observed no verbal or physical arguments.

L.K. testified that, after Bailey left, Butler leaned over and whispered, "[W]hen I find out that you're fucking him and sucking his dick, I'm going to beat that pretty little face right in." L.K. testified, "And he just took me right by the nose and along my chin. It just sent chills all the way through me," further explaining that she was "[v]ery afraid. It went all the way through me." L.K. thought to herself, "I have to get out of here," so she picked up her phone and keys and said that she needed to use the bathroom. Butler said that he needed to use the bathroom also and followed her. When L.K. came out of the bathroom, Butler was at a distance with his back to her. L.K. went straight down the steps to get outside. She crossed the street, got in her car, and Butler "was right there getting in the passenger's side."

Threats and violence in L.K.'s car

L.K. testified that Butler was extremely angry when he got in her car. According to L.K., Butler was screaming, "[W]here the fuck do you think you're going[?] ... [W]hat the fuck do you think you're doing[?]" When L.K. said that she was leaving, Butler grabbed her wallet/phone case, pulled the money out, and threw the phone. L.K. was in tears as she told Butler that she needed that money. L.K. testified that she did not feel comfortable looking for her phone or using it because Butler was enraged.

***3** L.K. testified that she did not know what she was going to do, only that she was not going back to her house. L.K. told Butler that she was going to the police, and he said that he did not care because it was his money, and he was taking it. But L.K. could not pull up to the police station because of road construction. So, she drove to a nearby Sonic restaurant, parked in a handicap spot, went inside, and asked the employees to call the police. When the police arrived, L.K. told Officer Whitney Wagner that Butler had taken money from her and had threatened her at Paolucci's. Wagner told L.K. that her conflict with Butler was a civil matter and that she could not force Butler out of the house because she had not given him 30 days' notice. While the police were there, the Sonic employees called their manager, Melissa Clowers,

who happened to be friends with L.K. Clowers offered L.K. to stay at Clowers' place. The police let both parties leave, with L.K. driving and Butler on foot.

The drive to L.K.'s house

L.K. went home to grab her CPAP machine and other belongings for an overnight stay with Clowers. She called Clowers from the car on the way. While L.K. was talking and driving, Butler repeatedly called her phone. L.K. answered by adding Butler to a three-way call with Clowers. L.K. testified that Butler said, "[Y]ou went and did it. ... [Y]ou went ahead and pulled the white bitch card and you called in the white man and that's it, I'm going to come and kill you." Clowers testified that she heard Butler say, "I'm on my way, I am going to kill you, I'm not afraid of the police, I'm going to kill you." Butler's statement scared L.K. and she urinated in her pants. L.K. hung up on the three-way call and then got back on the phone with only Clowers. Clowers told L.K. that she would call the police for L.K. Butler also left L.K. a voicemail while she was driving, which said, "[B]itch, I know you're on the phone, I ain't dumb, I'm coming to show you how I get down, though."

L.K. arrived home, grabbed her belongings, changed her clothes, and waited for the police. The officer who arrived and spoke with L.K. was Wagner, the same officer she had just seen at Sonic. L.K. told Wagner what happened and then L.K. left for Clowers' home. As L.K. was pulling out of her driveway, she saw Butler with the police officers on the right side of the driveway, next to the garage door.

L.K. testified that she was scared, but she believed that Butler could not get into the house because L.K. had changed the locks and the ADT security code. L.K. testified that she thought she turned on the ADT alarm before she left for Clowers' home. In her patrol car, Wagner followed L.K. to Clowers' home and took both their statements.

The overnight hours

L.K. testified that while she spoke with Wagner and Clowers, she received phone calls from Butler. L.K. answered some of the calls, and Butler kept asking her where she was. L.K. did not tell him. Butler told L.K. to come get him because he did not have any place to stay, but L.K. told him to stay at whatever place he had been staying at. When L.K.'s phone rang another time, Wagner answered it and told Butler, "[T]his is Officer Wagner of the Atchison Police Department, do not call this phone any more, this is harassment," and hung up. Butler called again and told Wagner, "[B]itch, I don't care ... put her on the phone." L.K. and Clowers testified that Butler's phone calls stopped, either because L.K. blocked his number before her phone's battery died or because her battery died. Wagner left and Clowers got L.K. set up for the night.

L.K. felt sick to her stomach thinking about the events of the evening. She started thinking to herself, "I have to know where he is, I have to know what's happening." She turned her phone on and unblocked his number. L.K. spoke with Butler, who demanded to know where she was and demanded that she come and get him. L.K. would not tell him where she was and told him to stay at the house on U Street where he previously stayed. L.K. then realized that if he did walk to that house, his route could take him past Clowers' house where he would see L.K.'s car in the driveway.

***4** Worrying that staying with Clowers could put Clowers and her young children in danger, L.K. decided to return home around 4 a.m. L.K. testified that she wanted to go home and that she felt safe because the ADT alarm had not gone off. L.K. called and then texted Butler to see if he would respond, and she was relieved when he did not. She assumed that he had calmed down and possibly fallen asleep. L.K. made the decision to go home.

L.K. goes back home

When L.K. came into the kitchen from the garage, she did not hear the ADT warning signal, which usually sounded when she entered the house. Out of the corner of her eye, she saw Butler standing on the other side of the refrigerator holding a knife. L.K. testified that Butler "threw me up against the cabinets with the knife and said, get naked." As L.K. took off her clothes, she saw the ADT box with the wires cut sitting on the kitchen counter. Noticing that L.K. saw that he had disabled the system, Butler told her, "[T]hat's right, that's right, nobody's coming for you, you're done, you're done, you unleashed the beast, you're done." L.K. admitted that, at the preliminary hearing, she did not testify that Butler made this statement. But she claimed that she recalled his statement after reviewing a summary of the sexual assault nurse examiner (SANE) report.

Once L.K. was unclothed, Butler put the knife to her back and told her to get back to the bedroom. According to L.K., when she entered the bedroom, she saw that the bed had no sheets or blankets on it. L.K. said that she needed to go to the bathroom and Butler responded, "[T]here is no bathroom, there's no bathroom, you will piss that bed, you will shit that

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bed, you will puke that bed, because you're in that bed for two solid days." L.K. also claimed that Butler made a series of threats, including, "I'm going to cut you into pieces in these two days and I'm going to bury part of you with your mom and part of you with your dad and part of you with your sister out at that fucking cemetery that you love so much."

L.K. testified that Butler laid out a list of rules: that she would not see anyone all Mother's Day weekend, that if she got a call that she would say she was sick, that she would not yell out, that she would not call 911, and that she will not ask for help. Butler also told L.K. that if she tried to get the police there that he had a machine gun to take out every officer before they got there. L.K. described how Butler screamed at her and threatened to kill her daughter and her sister and make her watch.

Butler at one point demanded to know where L.K.'s keys were. After Butler went to the car to get the keys, he demanded that L.K. tell him where the spare keys were. When L.K. said that she did not know where the spare keys were, Butler choked her. L.K. testified that Butler was in a rage as he took her stuff and took her phone. L.K. testified that Butler demanded to know where she was earlier that evening. She told him that she was with Melissa Clowers. But Butler threw L.K.'s phone and said, "[Y]ou were not at Melissa's, you were fucking that fucking D Boy."

L.K. testified that she was praying and pleading, but Butler continued choking her. She testified about her vision narrowing and how she felt like she was not going to have any more air. L.K. testified that Butler was screaming, "I worked on you for so fucking long, I worked and worked and worked on you, and you went and fucked it up."

Rape – penetration by finger

***5** L.K. then testified that Butler spread her legs open and "put his face right down there smelling." L.K. testified that Butler put his fingers inside her vagina, saying that he was going to "get that motherfucker's cum out of there." L.K. testified that Butler stopped, looked at his fingers, smelled, and did it again. L.K. testified that she begged Butler to stop, but he was full of rage.

Sodomy – oral

L.K. testified that when Butler stopped digital penetration, she laid on the bed. L.K. asked Butler, "[C]an we just lay down[?]" Butler said, "No, no, no, you're going to suck my motherfucking dick." L.K. described how Butler laid on his back and positioned her between his legs, with one hand around her throat and the other hand grabbing her by the hair. L.K. testified that she vomited, and Butler said, "Go ahead, that's what I told you, you're going to puke, you're going to shit, you're going to piss, you're going to puke this bed." L.K. could not say how long this lasted but testified that Butler pulled her head up and said, "[S]top, I don't want to cum yet."

Rape – penetration by penis

L.K. testified that Butler told her to get in the other bedroom. Butler held the knife against L.K.'s back as they went to the second bedroom. Butler ordered L.K. to get on the bed "doggy-style," and he put his penis in her vagina without her consent. L.K. testified that during their relationship they would frequently use the spare bedroom bed for consensual sex in that position because the bedframe was shorter than the master bed. L.K. explained that this time was different because L.K. did not consent and because they were at the side of the bed, instead of the foot of the bed, so that Butler could set the knife on the bedside table. L.K. testified that Butler ejaculated, and she believed that her nightmare was finally going to be over.

Sodomy – anal penetration with finger

L.K. then testified that Butler said, "[Y]ou have to get yours," meaning that she needed to orgasm. Butler went to the master bedroom, carrying the knife, and returned with a vibrator. L.K. testified that Butler tried to induce an orgasm by rubbing the vibrator on her clitoris. She testified that Butler was aggravated that she was not having an orgasm, so he put his finger in her anus to make her orgasm. L.K. faked an orgasm thinking that it would make Butler stop.

Rape – penetration by vibrator

After L.K. faked an orgasm, Butler told her to return to the doggy-style position. L.K. testified that Butler put the vibrator in her vagina and kept pushing. L.K. testified as follows: "I had plastic clear up to here. It was just horrible. I just kind of collapsed, like, oh, you know, making him think that, okay, wow, you know, I'm done, you know, whatever, please." L.K. testified that she collapsed on the bed, trying to convince Butler that she had an orgasm, and she noted that the sun was starting to come up.

L.K. escapes

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As the sun was coming up, L.K. and Butler lay down to go to sleep. L.K. testified that they went back to the master bedroom, with the knife on Butler's side of the bed. Butler allowed L.K. to set up her CPAP so that they could lie down for a bit. L.K. testified that she does not like to be touched while she sleeps, but Butler told her, "I'm definitely going to be holding onto you the whole time," and wrapped his arm around her neck. L.K. pretended to fall asleep.

L.K. testified that she slid out from under Butler's arm and crept to the bathroom, which was only a few steps away. While she used the bathroom, she had a direct line of sight to Butler. L.K. testified that she was able to quietly grab some clothes and dress in the bathroom. She testified that she was able to quietly open the bedroom door without waking Butler, while she watched him to see if he would wake. When she entered the kitchen, she saw that the door leading from the kitchen to the garage was open. In the garage, L.K. saw that the door to the outside was broken off its hinges, leaning on a trash can. L.K. crossed the street and knocked on a neighbor's door. The residents let her in and called 911. Atchison police went to L.K.'s house and arrested Butler. Police photographed the door to the garage off its hinges and found male underwear beside L.K.'s bed which L.K. identified as Butler's.

The proceedings against Butler

***6** Based on L.K.'s allegations, the State charged Butler with 15 counts: 3 counts of rape, 2 counts of aggravated criminal sodomy, 2 counts of criminal threat, and 1 count each of aggravated kidnapping, aggravated assault, aggravated robbery, robbery, criminal damage to property, harassment by a telecommunications device, aggravated domestic battery, and intimidation of a victim. Butler proceeded to trial on all counts. Butler's first jury trial ended in a mistrial when Officer Wagner testified that L.K.'s statement was that Butler "didn't care what happened, he was going to kill her, he didn't care if he went back to prison." The trial court found that the statement related to Butler's prior criminal history and was too prejudicial for the trial to continue.

At Butler's second jury trial, Stephanie Rissen, the sexual assault nurse examiner who examined L.K., testified about the physical examination. Rissen found no physical evidence of strangulation, including no reddening of the skin or burst blood vessels. Rissen found bruising on L.K.'s right forearm. L.K. told Rissen that it was painful to swallow, and Rissen had her see an emergency room physician for her throat and lower back pain. In addition, L.K.'s medical history included back pain from degenerative disk disease. L.K., however, testified that her back problem was "not related at all to [Butler] or any interaction with him." Rissen also found no injuries during the genital exam. And L.K. testified that she suffered no tearing or bruising to her vaginal area.

The State presented evidence of seminal fluid, detected on the vaginal swab and the anal swab of the SANE kit. A partial DNA profile was consistent with Butler's DNA.

At Butler's second trial, witnesses again referenced Butler's previous incarceration. First, defense counsel followed up on L.K.'s discovery that Butler was calling and texting another woman. The woman testified about the nature of the conversations as follows: "Basically, actually, just how he changed getting out of jail, how he was trying to do his life better, how he was a Christian. We talked about Gospel." Second, when defense counsel questioned the Cricket store manager about L.K.'s threats to have Butler arrested, the manager testified, "I remember her saying about him being maybe on parole or probation and I'm going to call the cops if you try to activate your phone."

After trial, Butler moved to discharge his attorney. The trial court granted his motion, allowing Butler to represent himself at sentencing.

Butler moved for a new trial based on ineffective assistance of counsel, arguing that his attorney was ineffective for failing to move for a mistrial after two witnesses mentioned his prior incarceration and for failing to adequately cross-examine L.K. At sentencing, the trial court heard Butler on his motion for a new trial. During this hearing, Butler articulated that part of his complaint related to cross-examination of Rissen, specifying that his attorney "brung the rape kit out. But she didn't speak on the full rape kit." The trial court found that Butler had not sufficiently presented a claim of ineffective assistance of counsel to merit a hearing under *State v. Van Cleave*, 239 Kan. 117, 716 P.2d 580 (1986). The trial court summarily denied Butler's motion and proceeded to sentencing. Based on a criminal history score of C, the trial court sentenced Butler to a controlling 543-month prison sentence.

Butler timely appeals.

ANALYSIS

Did sufficient evidence support Butler's conviction for aggravated kidnapping?

Butler argues that any confinement of L.K. was incidental to the rape and aggravated criminal sodomy charges and, thus, the evidence did not support a separate conviction for aggravated kidnapping. The State argues that Butler refers to the wrong subsection of the kidnapping statute and that the evidence supports a conviction of the crime as charged. Our standard of review for sufficiency of the evidence is the following:

> ***7** " 'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.' [Citations omitted.]" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

"This is a high burden, and only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict. [Citations omitted.]" *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

Butler claims that the State failed to establish the elements of aggravated kidnapping separately from the rape and sodomy charges. "Under the Due Process clause of the 14th Amendment, no person may be convicted of a crime unless every fact necessary to establish the crime with which he is charged is proven beyond a reasonable doubt." *State v. Switzer*, 244 Kan. 449, 450, 769 P.2d 645 (1989) (citing *In re Winship*, 397 U.S. 358, 368, 90 S. Ct. 1068, 25 L. Ed. 2d 368 [1970]). Butler argues that the taking or confinement of another person must be more than incidental to the underlying offense.

K.S.A. 2018 Supp. 21-5408 lays out the elements of kidnapping as follows:

> "(a) Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person:
>
> (1) For ransom, or as a shield or hostage;
>
> (2) to facilitate flight or the commission of any crime;
>
> (3) to inflict bodily injury or to terrorize the victim or another; or
>
> (4) to interfere with the performance of any governmental or political function.
>
> "(b) Aggravated kidnapping is kidnapping, as defined in subsection (a), when bodily harm is inflicted upon the person kidnapped."

Butler and the State disagree over whether we should apply *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), or *State v. Burden*, 275 Kan. 934, 69 P.3d 1120 (2003). Butler argues that, under *Buggs*, the State failed to prove aggravated kidnapping because his actions were part of the crimes of rape and did not constitute a second, separate crime. To prove that a defendant committed a taking or confinement to facilitate a crime, the State must show that a victim's movement or confinement (1) was not incidental to the underlying crime, (2) was not inherent in the nature of the underlying crime, and (3) made the defendant's underlying crime substantially easier to commit or lessened substantially the defendant's risk of detection. 219 Kan. at 216.

In *Buggs*, the female victim and her son worked at a Dairy Queen in Wichita until closing. When they left, the mother put over $300 in a bank bag and put that bag in her purse. Charles Buggs and Ronald Perry approached in the parking lot and told the workers that Perry had a gun. Buggs and Perry instructed the workers to unlock the back door and go back in the Dairy Queen. Inside, the defendants took the money and Buggs raped the mother. A jury convicted Buggs of aggravated kidnapping and rape of the mother, kidnapping of the son, and aggravated robbery. The *Buggs* court held that there was sufficient evidence for the kidnapping convictions because Buggs moved the victims from a public area to a private area, which facilitated the crimes of robbery and rape. 219 Kan. at 216.

***8** The *Buggs* court explained the test for kidnapping as follows:

> "We therefore hold that if a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

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"(*a*) Must not be slight, inconsequential and merely incidental to the other crime;

"(*b*) Must not be of the kind inherent in the nature of the other crime; and

"(*c*) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

"For example: A standstill robbery on the street is not a kidnapping; the forced removal of the victim to a dark alley for robbery is. The removal of a rape victim from room to room within a dwelling solely for the convenience and comfort of the rapist is not a kidnapping; the removal from a public place to a place of seclusion is." 219 Kan. at 216.

This court elaborated on the *Buggs* court's reasoning in *State v. Olsman*, 58 Kan. App. 2d 638, 473 P.3d 937 (2020), *rev. denied* 312 Kan. 899 (2021). Matthew Allen Olsman carried J.P. down the hall into his bedroom, threw her onto the bed, and digitally penetrated her vagina. A jury convicted Olsman of attempted rape and kidnapping.

This court held that the confinement underlying the kidnapping charge was incidental to the rape. 58 Kan. App. 2d at 645. For that reason, the *Olsman* court reversed the kidnapping conviction, explaining: "Rape through force necessarily and inherently requires confinement of the victim to a particular place where the rape occurs. After all, if the victim were allowed to leave, there would be no rape." 58 Kan. App. 2d at 649. Thus, Butler argues that there was no independent or significant distinction between the force used to carry out the rapes and sodomies versus the confinement that formed the basis of the aggravated kidnapping conviction.

The State responds that the subsections of K.S.A. 2018 Supp. 21-5408 are relevant to the analysis. The State notes that Butler's argument and citation to *Buggs* reference the language of K.S.A. 2018 Supp. 21-5408(a)(2), a kidnapping with the intent "to facilitate flight or the commission of any crime." But the State points out that it charged Butler with kidnapping with the intent "to inflict bodily injury or to terrorize the victim" under K.S.A. 2018 Supp. 21-5408(a)(3). Thus, the State argues that we should not follow *Buggs* but should instead look to *Burden* as the more applicable precedent.

In that regard, Gerry A. Burden was in his residence with C.G. when he became angry with her and began hitting her. He ripped her clothes off and digitally raped her and sodomized her. She broke away from him and ran to the back door. He caught up to her, put her in a choke hold, and forced her back to the bedroom. He threw her on the bed, hit her, choked her, and threatened to kill her. A jury convicted Burden of aggravated kidnapping, rape, aggravated criminal sodomy, and criminal threat. *Burden*, 275 Kan. at 934-35.

The way in which the State argues for applying *Burden* presents a clear problem. Our Supreme Court upheld Burden's conviction for aggravated kidnapping, stating that the analysis of *Buggs* did not apply. The State here argues for the same result:

***9** "[T]he Kansas Supreme Court clearly articulated in [*Burden*] that those additional tests should only be applied *if the State charged* kidnapping under K.S.A. 21-5408(a)(2)—to facilitate flight or the commission of any crime. *Buggs* does not apply *when the State charges* kidnapping under K.S.A. 21-5408(a)(3)—to inflict bodily injury or to terrorize the victim of another." (Emphases added.)

The problem with this reasoning is that it gives the State control over this court's analysis when it drafts the charging documents. If either K.S.A. 2018 Supp. 21-5408(a)(2) or K.S.A. 2018 Supp. 21-5408(a)(3) could apply to a defendant's actions, then the State can dictate the appellate court's analysis based on how it decides to charge a defendant. For example, if the State charges a defendant under K.S.A. 2018 Supp. 21-5408(a)(2), it runs the risk that Kansas appellate courts would apply *Buggs* and reverse the defendant's conviction. But the State could avoid that possibility simply by charging kidnapping under K.S.A. 2018 Supp. 21-5408(a)(3), and, thus, precluding any need to perform a *Buggs* analysis. This argument would then give the State the ability to dictate whether a *Buggs* or a *Burden* test should be used.

As a result, this creates a heavy, fact-intensive analysis, as demonstrated by *Burden* itself. The *Burden* court held that the evidence supported a conviction for kidnapping with specific reference to particular facts.

"Under the evidence herein, the jury was presented with evidence that defendant had beaten, stripped, raped, and

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> sodomized the victim in the bathroom. *Thereafter*, the victim, naked, broke free and ran to the back door of the kitchen to escape. Before she could get through the door, she was caught by defendant, who placed her in a choke hold and forced her down the hall and into a bedroom where he beat and threatened to kill her. This is sufficient evidence that a taking occurred with intent to terrorize or commit bodily injury on the victim." (Emphasis added.) 275 Kan. at 944-45.

In laying out this chronology, the *Burden* court illustrated that Burden's convictions were based on separate acts. Burden was convicted of rape and aggravated criminal sodomy. But the aggravated kidnapping could not have been to facilitate the commission of those crimes because the rape and sodomy occurred first, and the kidnapping happened as the victim attempted escape. For example, Burden dragged her back down the hall and beat her, demonstrating that he took her with the intent to commit bodily harm. Notably, he was not convicted of a separate battery. Thwarting her escape and beating her was sufficient for a conviction under K.S.A. 21-3420(c), later codified as K.S.A. 21-5408(a)(3), for aggravated kidnapping, a taking with intent to commit bodily harm.

The State here is partially correct and does not entirely misstate the holding of *Burden*. The *Burden* court held that the *Buggs* analysis only applies to kidnappings charged under K.S.A. 21-3420(b), later codified as K.S.A. 21-5408(a)(2). But the *Burden* court's discussion operated under the assumption that the different subsections were mutually exclusive, as follows:

> "The three-pronged *Buggs* test is applicable in determining whether the taking or confining was done with the intent to facilitate flight or the commission of another crime as set forth in [K.S.A. 21-3420] subsection (b) [now codified at K.S.A. 21-5408(a)(2)]. There is nothing in *Buggs* that would indicate these three restrictions were intended to apply to any taking or confining charged under any subsection other than (b). In fact, the language in *Buggs* is to the contrary. *There is no underlying crime intended to be facilitated under (c)* [now codified at K.S.A. 21-5408(a)(3)]; the taking or confining is done with the intent to inflict bodily injury upon or to terrorize the victim or another; facilitation is irrelevant herein." (Emphasis added.) 275 Kan. at 943-44.

***10** The reasoning here is implicit rather than explicit. The *Burden* court did not hold that the State would err if it charged kidnapping under K.S.A. 2018 Supp. 21-5408(a)(3) when (a)(2) would apply, or vice versa. But in general, it is possible for a State's complaint to be defective. See *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *State v. Luebbert*, No. 118,965, 2020 WL 111290, at *5 (Kan. App. 2020) (unpublished opinion) (holding that the complaint contained a technical defect but that such error was harmless and did not require reversal). But the *Burden* court did not state that there is a "wrong" way to charge aggravated kidnapping. It simply made the obvious point that it is not possible to charge kidnapping with intent to facilitate the commission of a crime if there is no underlying separate crime. The State seeks to extend this holding to give itself the ability to choose whether to charge kidnapping under K.S.A. 2018 Supp. 21-5408(a)(2) or (a)(3) and to have that choice control the appellate court analysis.

The State gives *State v. Eckert*, No. 120,566, 2022 WL 628660 (Kan. App. 2022) (unpublished opinion), *rev. denied* 316 Kan. __ (July 8, 2022), as an example of this court determining that the *Buggs* test did not apply to an aggravated kidnapping charged under K.S.A. 2015 Supp. 21-5408(a)(3). But *Eckert* presents the State with the same problem as *Burden*: the evidence shows that the kidnapping was separate and apart from the other crimes of conviction—there was no underlying crime that the kidnapping was intended to facilitate.

To illustrate, Justin Burke Eckert hit Amber Dial three or four times with a piece of wood that they used to prop a window open. A jury convicted Eckert of aggravated battery. Eckert held a knife against Dial, telling her to be quiet. A jury convicted Eckert of aggravated assault with a deadly weapon. When Eckert's mother knocked on the door of the home, Eckert told Dial to be quiet or he would shoot her and his mother. A jury convicted Eckert of criminal threat.

On appeal, Eckert contested his conviction for aggravated kidnapping. In etching the facts that were separate and apart from Eckert's other crimes of convictions, this court affirmed:

> "Taking the evidence in a light most favorable to the State, the evidence established: (1) Dial got up and tried to get to the living room to escape the house, but Eckert pulled her back by her hair; (2) Dial again broke free from Eckert's grasp only to be dragged back into the bedroom by her feet;

> (3) when Eckert's mother showed up, Eckert threatened to kill Dial and her family if she was not quiet; and (4) Dial could not leave the house until Eckert fell asleep. Eckert does not contest that the confinement occurred with the intent to inflict bodily harm or terrorize Dial and he did in fact inflict bodily injury on Dial." 2022 WL 628660, at *5.

The *Eckert* court, like the *Burden* court, focused on the thwarted escape attempts in affirming Eckert's conviction for aggravated kidnapping. The *Eckert* court also cited different evidence to support aggravated kidnapping from the evidence supporting other charges, with some slight overlap with criminal threat. But the *Burden* and *Eckert* courts focused on reasons for taking or confinement *other than* the commission of a separate crime. In both cases, the courts found sufficient evidence of confinement which was *not* intended to facilitate the commission of a crime but was directed at another purpose.

Butler correctly notes that the State's theory at trial was that the aggravated kidnapping was intended to facilitate the rapes and sodomy crimes. This means that the State charged Butler under K.S.A. 2018 Supp. 21-5408(a)(3) but proceeded at trial as though it charged him under K.S.A. 2018 Supp. 21-5408(a)(2).

Particularly, Butler bases his argument on the State's theory of the case at trial. He assumes that if the State told the jury that he kidnapped L.K. to facilitate the rapes, then *Buggs* applies. In *Eckert*, the defendant acknowledged that *Burden* applied, but he argued that *Burden* was wrongly decided. *Eckert*, 2022 WL 628660, at *5. Conversely, Butler does not argue that *Burden* was wrongly decided. He simply asks us to apply *Buggs* as the most relevant controlling precedent, while the State argues that *Burden* is the more appropriate precedent to follow. We are duty-bound to follow our Supreme Court precedents unless there is some indication that our Supreme Court is departing from its previous position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). We are bound to follow both *Buggs* and *Burden*, but the question before us is which one of the differing standards or tests is the more appropriate to apply in this case.

***11** The State argues for an uncomplicated rule. That is, if the State charges a defendant under K.S.A. 2018 Supp. 21-5408(a)(2), then this court applies a *Buggs* analysis. But if the State charges kidnapping or aggravated kidnapping under K.S.A. 2018 Supp. 21-5408(a)(3), then this court applies a *Burden* analysis. While this rule is simplistic, its easy application would allow the State to manipulate the facts of a defendant's conduct in deciding whether to charge the defendant under K.S.A. 2018 Supp. 21-5408(a)(2) or K.S.A. 2018 Supp. 21-5408(a)(3). For example, the State here seems to think that both (a)(2) and (a)(3) could apply. The State charged Butler with the crimes of rape and argued that the aggravated kidnapping facilitated the rapes, as in subsection (a)(2). But the State also described the rapes as the bodily harm committed under subsection (a)(3). The State's selective charging has left us with little recourse but to look past the complaint to Butler's conduct. In short, the only way to resolve which one of the tests should control—*Buggs* or *Burden*—is to apply each test to the facts of this case.

For instance, if the State had charged Butler under K.S.A. 2018 Supp. 21-5408(a)(2), then the conviction would fail the *Buggs* test, and we would reverse Butler's conviction for aggravated kidnapping. In its brief, the State concludes its argument by laying out the facts underlying the aggravated kidnapping charge. The State describes how Butler waited for L.K. to enter the home and then ambushed her in the kitchen before moving her to the bedroom: "During the next several hours, the defendant did move L.K. from the master bedroom to a second bedroom and back to the master bedroom at knife point." But this is precisely what the *Buggs* court stated would *not* constitute a kidnapping separate from the crime of rape: "The removal of a rape victim from room to room within a dwelling solely for the convenience and comfort of the rapist is *not* a kidnapping; the removal from a public place to a place of seclusion is." (Emphasis added.) 219 Kan. at 216.

Highly informative, L.K. testified that the height of the beds differed and that, during their consensual sexual relationship, they would move to the second bedroom to make a particular position more convenient. So, Butler moved L.K. from room to room within a dwelling solely for his convenience, but he never moved her from a public place to a place of seclusion. Using *Buggs* as the test, Butler provides a textbook example of a confinement which is not separate from the rapes and is therefore not a kidnapping. His actions also echo the *Olsman* court's statement that all rapes through force inherently require confinement because if the victim were allowed to leave, then there would be no rape.

Thus, applying the *Buggs* test, Butler's conviction for aggravated kidnapping is invalid, at least based on the State's closing argument that Butler confined L.K. to commit the

crimes of rape. In short, L.K.'s confinement was incidental to the crimes of rape and aggravated sodomy, confinement was inherent to the crimes, and the confinement had no significance independent of those crimes. See 219 Kan. at 216. The inescapable conclusion is that, if the State had charged Butler under K.S.A. 2018 Supp. 21-5408(a)(2), then we would have vacated his conviction for kidnapping.

But that does not end our analysis. Because we review the evidence in the light most favorable to the prosecution, we must determine whether there was sufficient evidence to support Butler's conviction of aggravated kidnapping under any theory. See *State v. Johnson*, 46 Kan. App. 2d 870, 886, 265 P.3d 585 (2011). The jury is not limited to the State's theory of the case. And jury deliberations are confidential, so there is no way of knowing under which set of facts the jury found Butler guilty. If the evidence could support a conviction under any theory, we would affirm. The only theory excluded is the one that the State presented at closing because that theory would result in Butler being convicted of two different crimes for identical conduct. See *Olsman*, 58 Kan. App. 2d at 665 (Warner, J., concurring in part and dissenting in part). In short, was there other confinement of L.K. which was not intended to facilitate the commission of rapes and aggravated criminal sodomies?

***12** Because the jury convicted Butler of 15 individual crimes, the aggravating kidnapping charge allowed Butler to be convicted of two different crimes for the same conduct. For example, Butler waited for L.K. to enter the home and then held a knife to her throat. The jury convicted him of aggravated assault for placing L.K. in reasonable apprehension of immediate bodily harm and for holding L.K. with a deadly weapon: a knife. If we assume that this action was the kidnapping, then a double jeopardy issue arises. Butler held L.K. at knifepoint, which the jury could have found was the confining of L.K., accomplished by threat, with the intent to hold her and to terrorize her. See K.S.A. 2018 Supp. 21-5408(a)(2). But this same act underlies Butler's conviction for aggravated assault, making that conviction multiplicitous. If we rely on the evidence of Butler holding L.K. at knifepoint, then his aggravated assault conviction becomes subsumed into his aggravated kidnapping conviction.

Butler also choked L.K., and the jury convicted him of domestic battery. He was charged with aggravated domestic battery. Again, the same two issues arise. The evidence that his choking was a confinement by force could substantiate an aggravated kidnapping charge because the domestic battery charge required the jury to find that Butler "knowing caused bodily harm to L.K." This same bodily harm evidence is also required to establish an aggravated kidnapping. Then, the domestic battery conviction becomes multiplicitous with the aggravated kidnapping conviction.

Butler threatened L.K., laying down ground rules for how the weekend would progress. The State charged Butler with criminal threat "with the intent to terrorize another or in reckless disregard of the risk of causing such terror, to-wit: threatened to kill L.K., contrary to K.S.A. 21-5415(a)(1)." And the jury convicted him of criminal threat. The evidence that he threatened her would be sufficient to substantiate a conviction for kidnapping.

In short, to allow evidence for another crime to count towards Butler's aggravated kidnapping would be to allow the State to improperly use Butler's same conduct to convict him of two separate crimes. Butler's actions feel intuitively like a kidnapping. But Butler argues that the State's evidence supporting those other crimes cannot also support his conviction for aggravated kidnapping. As the *Olsman* court succinctly pointed out: "The *Buggs* standards, though sometimes difficult to apply, aim to ensure a defendant is not convicted of two different crimes for identical conduct." *Olsman*, 58 Kan. App. 2d at 665 (Warner, J., concurring in part and dissenting in part) (citing *State v. Weber*, 297 Kan. 805, 808, 304 P.3d 1262 [2013]; *State v. McKessor*, 246 Kan. 1, 10-11, 785 P.2d 1332 [1990]). Thus, upholding the aggravated kidnapping conviction would require us to allow what the *Buggs* holding prohibited.

Like in *Olsman*, there were no witnesses to the crimes alleged against Butler, and thus, any confinement to the bedrooms did not lessen the threat of detection. The kitchen evidence shows that Butler confined L.K. with the intent to terrorize her, which would suffice if his conviction was for simple kidnapping. But a conviction for aggravated kidnapping requires the additional element that Butler actually inflicted bodily harm on L.K. Although Rissen testified that she found some bruising on L.K.'s right forearm, this bruising likely occurred while Butler was committing the three rapes and the two aggravated criminal sodomy charges. As a result, the bruising of her arm is not an independently significant act. By contrast, the bruising marks the point at which Butler began

his use of force to physically control L.K. and carry out the intended rapes and sodomies.

In short, there was no evidence that the initial confinement occurred for the purpose of inflicting some sort of bodily injury independent of the force required to commit the rapes and sodomy charges. For one thing, after Butler forced L.K. to undress at knife point in the kitchen, he required her to go the bedroom. In closing argument, the prosecutor recapped the evidence of what occurred in the two bedrooms and then told the jury the following:

> ***13** "All of this leads to the aggravated kidnapping charge. The defendant confined [L.K.] by force or threat. He did so with the intent to hold her, to inflict bodily injury on, or to terrorize her. Bodily harm was inflicted on her. He raped her over and over and over again. That is bodily harm."

Thus, in her closing argument, the prosecutor even described the confinement as part of the commission of the rapes. The conduct the State argued forms the factual basis for both the rapes and the sodomies and the aggravated kidnapping. Just as in *Olsman*, the confinement in this case has no significance beyond the rape and the sodomy charges. As a result, any taking or confinement that occurred here was incidental to the alleged rapes and sodomy charges.

Moreover, the bodily injury alleged as part of the aggravating kidnapping charge was rape. Nevertheless, Rissen found no genital injuries of L.K. during her genital exam. Furthermore, L.K. testified that she suffered no tearing or bruising to her vaginal area.

Because there is a lack of independent or significant evidence distinguishing between the force used to carry out the rapes and sodomy charges and the confinement that the State alleged formed the basis of the aggravating kidnapping charge, there exists insufficient evidence to support Butler's conviction for aggravating kidnapping. Thus, we vacate that conviction. Butler's sentence for aggravated kidnapping is concurrent with, and shorter than, his three convictions for rape. So, the duration of his prison sentence would not be affected. As a result, a remand for resentencing is unnecessary.

Are Butler's three convictions of rape and two convictions of aggravated criminal sodomy multiplicitous in violation of the Double Jeopardy Clause?

Butler claims that his three convictions of rape are multiplicitous. He also claims that his two convictions of aggravated criminal sodomy are multiplicitous. The State disagrees, saying that counts 1, 3, and 5, the rape counts, were broken up by the intervening events of counts 2 and 4, the aggravated criminal sodomy counts.

Multiplicity is the charging of a single offense in multiple counts of an information. The Double Jeopardy Clause of the United States Constitution and the Kansas Constitution Bill of Rights prohibit the State from securing multiple convictions on multiplicitous charges. *State v. Sprung*, 294 Kan. 300, 306, 277 P.3d 1100 (2012). Appellate courts exercise unlimited review when determining whether convictions are multiplicitous. *Weber*, 297 Kan. at 809.

In resolving a multiplicity claim, Kansas appellate courts first determine whether the convictions arose from the same conduct—whether the conduct is discrete or unitary. If the conduct is discrete, the convictions do not arise from the same offense and there is no double jeopardy violation. But if the conduct arose from the same act or transaction, appellate courts then determine whether that conduct constitutes one statutory offense or two. *Sprung*, 294 Kan. at 306; *State v. Schoonover*, 281 Kan. 453, 496, 133 P.3d 48 (2006).

Under the first prong—whether a defendant's convictions arose from the same conduct—this court considers several factors, including whether: (1) the acts occurred at or near the same time, (2) the acts occurred at the same location, (3) a causal relationship existed between the acts, in particular whether an intervening event separated the acts, and (4) a fresh impulse motivated some of the conduct. *Sprung*, 294 Kan. at 307.

***14** Under the second prong, appellate courts review the statutes to determine whether the same act or transaction involves conduct criminalized under more than one statute. " '[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not. [Citations omitted.]' " *Schoonover*, 281 Kan. at 466-67.

Here again, our analysis is highly fact intensive. Butler presents cases in which several acts arose from the same

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continuous transaction and the separate convictions for the acts were multiplicitous. See *State v. Colston*, 290 Kan. 952, 235 P.3d 1234 (2010); *State v. Potts*, 281 Kan. 863, 135 P.3d 1054 (2006); *State v. Dorsey*, 224 Kan. 152, 578 P.2d 261 (1978); *State v. Aguilera*, No. 103,575, 2011 WL 2555423 (Kan. App. 2011) (unpublished opinion). The State cites cases in which the opposite is true: Several acts were committed close in time and location but were different enough from each other to support multiple convictions. See *State v. Sellers*, 292 Kan. 346, 253 P.3d 20 (2011), *overruled on other grounds by* *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *State v. Richmond*, 250 Kan. 375, 827 P.2d 743 (1992); *State v. Zamora*, 247 Kan. 684, 803 P.2d 568 (1990); *State v. Howard*, 243 Kan. 699, 763 P.2d 607 (1988); *State v. Wood*, 235 Kan. 915, 686 P.2d 128 (1984). All these cases begin with the question of whether the sexual acts leading to the convictions were unitary or distinct.

As to the first factor of unitary conduct, the record reveals that Butler committed illegal sexual acts in the early hours of May 11, 2019. L.K.'s testimony places the events between a time well past midnight but before sunrise, likely between 4 a.m. and 6 a.m. As to the second factor, the record reveals that Butler committed the acts in two different bedrooms within L.K.'s house. As is often the case, however, the last two factors of the analysis are the more complex factors in determining unity of action. See *State v. Martin*, No. 107,602, 2013 WL 5422310, at *5 (Kan. App. 2013) (unpublished opinion). The third and fourth factors deal respectively with whether there were intervening events and a fresh impulse.

The order of events shows that Butler committed multiple crimes, not one continuous one. Butler does not argue that his conviction for rape as count 1 is multiplicitous with his conviction for aggravated criminal sodomy as count 2. Both parties acknowledge that they are two different crimes. Butler instead argues that his three rape convictions are multiplicitous with one another. And he argues that his two aggravated criminal sodomy convictions are multiplicitous with one another. But the order of Butler's crimes shows that they are not multiplicitous. Conduct is not unitary when sex acts are "separated from each other by other sexual acts." *Howard*, 243 Kan. at 703. Counts 1 and 3 are rape but count 2 is aggravated oral sodomy. That is, the first two acts of rape have the intervening act of aggravated sodomy in between. His act of digital rape would not merge with his act of forcing oral sex. See 243 Kan. at 703.

The crimes of rape and aggravated criminal sodomy do not have an identity of elements. See *Colston*, 290 Kan. at 972 (comparing elements of rape and aggravated indecent liberties with a child). Rape requires sexual intercourse, meaning penetration of the female sex organ. K.S.A. 2018 Supp. 21-5501(a); K.S.A. 2018 Supp. 21-5503. Aggravated criminal sodomy requires sodomy, meaning oral contact with or penetration of the genitalia, or anal penetration, or oral or anal copulation or sexual intercourse with an animal. K.S.A. 2018 Supp. 21-5501(b); K.S.A. 2018 Supp. 21-5504. Rape must include penetration of the female sex organ and aggravated criminal sodomy must not.

***15** After digitally raping L.K., Butler switched to forcing her to perform oral sex. The aggravated criminal sodomy act is an intervening event. See *Martin*, 2013 WL 5422310, at *7. From the oral sex, Butler switched to penile penetration of L.K.'s female sex organ. The oral sodomy does not merge with penile rape because they lack identity of elements. And the oral sodomy acts as the intervening event between the two rapes.

The same holds true for the penile rape, aggravated anal sodomy, and rape with the vibrator. After Butler raped L.K. with his penis and ejaculated, he held a vibrator to L.K.'s clitoris and inserted one of his fingers in her anus. After the anal sodomy, he penetrated L.K.'s vagina with the vibrator. Oral and anal sodomy are separate crimes and are not multiplicitous. *State v. McHenry*, No. 119,230, 2020 WL 2503484, at *14-15 (Kan. App. 2020) (unpublished opinion). And in any event, the two sodomies are separated by penile rape. The anal sodomy is an intervening event separating the rape by Butler's penis from the rape by vibrator. In this case, each new sex crime acts as an intervening event which distinguishes it from the previous crime. Because Butler's convictions are not multiplicitous, we affirm.

Did the State commit reversible prosecutorial error during closing argument?

Butler argues that the prosecutor's comments during closing argument inaccurately stated the evidence and were designed to inflame the passions of the jury. The State argues that the comments were within the wide latitude afforded

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to prosecutors or, alternatively, were harmless error not requiring reversal.

Appellate courts use a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

> "To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" *Sherman*, 305 Kan. at 109.

See also *State v. Fraire*, 312 Kan. 786, 791-92, 481 P.3d 129 (2021).

The statutory harmlessness test also applies to prosecutorial error, but when analyzing both constitutional and nonconstitutional error, appellate courts only need to address the higher standard of constitutional error. *Sherman*, 305 Kan. at 109.

Even if the prosecutor's actions are egregious, reversal of a criminal conviction is not an appropriate sanction if the actions are determined to satisfy the constitutional harmlessness test. *Sherman*, 305 Kan. at 114. Courts may still use prosecutorial misconduct as a descriptor for more serious occurrences. *State v. Chandler*, 307 Kan. 657, 695, 414 P.3d 713 (2018) (finding prosecutor's conduct to amount to prosecutorial misconduct in addition to prosecutorial error).

***16** The *Sherman* decision, an opinion changing the law, acts prospectively and applies to all cases pending on direct review or not yet final. *State v. Lindemuth*, 312 Kan. 12, 16, 470 P.3d 1279 (2020).

It is improper for a prosecutor to comment on facts not in evidence, to divert the jury's attention from its role as fact-finder, or to make comments that serve no purpose other than to inflame the passions and prejudices of the jury. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 887 (2021); *State v. Stimec*, 297 Kan. 126, 128, 298 P.3d 354 (2013).

The extent of any ameliorating effect of a jury admonition attempting to remedy a prosecutor's error must be considered in determining whether the erroneous conduct prejudiced the jury and denied the defendant a fair trial. *State v. Barber*, 302 Kan. 367, 383, 353 P.3d 1108 (2015).

Appellate courts will review a prosecutorial error claim based on a prosecutor's comments made during voir dire, opening statement, or closing argument even without a timely objection, but the court may figure the presence or absence of an objection into its analysis of the alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Butler asserts that the State committed prosecutorial error when the prosecutor told the jury that he "took the vibrator and repeatedly slammed it into her vagina over and over and over again" and "raped her over and over and over again." He argues that these statements were factually incorrect and were designed to inflame the passions of the jury.

Butler is correct about the prosecutor's statement that he slammed the vibrator into L.K.'s vagina. The implication of the prosecutor's statement is error because (1) it misstates the evidence and (2) the statement seeks to inflame the passions of the jury. At trial, L.K. testified as follows:

> "And he took the vibrator and started putting it inside of me, inside my vagina. And he just (makes sound). It went on forever.
>
> ....
>
> "I had plastic clear up to here. It was just horrible. I just kind of collapsed, like, oh, you know, making him think that, okay, wow, you know, I'm done, you know, whatever, please."

L.K. described a rape of extended duration. And her testimony of "plastic clear up to here" is suggestive and presumably was accompanied by a hand movement not included in

the transcript. But the prosecutor's inference of repeated "slamming" extends or exaggerates L.K.'s testimony beyond what she actually said. See *Stimec*, 297 Kan. at 129 (finding that the prosecutor misstated the evidence by suggesting that the defendant " 'stroked' " his son's penis with lotion when the evidence established that the defendant applied lotion but did not establish stroking). The prosecutor's statement that Butler "raped her over and over and over again" stayed within the bounds of the wide latitude afforded to prosecutors, and the expression followed the evidence of multiple illegal sexual acts. But the prosecutor's comment about Butler's use of the vibrator strayed beyond the evidence and reasonable inferences drawn from the evidence, with no other reason than to inflame the jury. See *State v. Majors*, 182 Kan. 644, 648, 323 P.2d 917 (1958) ("Although an attorney may indulge in impassioned bursts of oratory or may use picturesque language as long as he introduces no facts not disclosed by the evidence, he is bound to remember that he is an officer of the court, that his liberty of argument must not degenerate into license, and that he should always be decorous in his remarks to the extent that they do not impair administration of justice.").

***17** But this error was harmless. This court considers the ameliorating effect of jury instructions and jury admonitions. *Barber*, 302 Kan. at 383. The trial court instructed the jury as follows: "Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded." The ameliorating effect of such an instruction may be small, but appellate courts presume that jurors follow the trial court's instructions. *State v. Peppers*, 294 Kan. 377, 392, 276 P.3d 148 (2012). The effect of the instruction may have been small, but the evidence was strong.

Viewing the evidence from the entire record, we find beyond a reasonable doubt that the error did not affect the jury's verdict. The physical evidence showed how Butler entered L.K.'s home. The State presented photographs of the door to the garage knocked off its hinges and the ADT security system cut off the wall with a knife. The neighbors testified about the frantic way in which L.K. rang their doorbell, knocked on the door, and asked for help. The State presented DNA evidence that the semen on the vaginal swab matched Butler's DNA sample. The police arrested Butler as he left L.K.'s home and they found Butler's underwear in L.K.'s bedroom. Considering the evidence, we conclude that the prosecutor's misstatement of fact would not have affected the jury's verdict.

Did the trial court err by denying Butler's motion for a new trial based on ineffective assistance of counsel?

Butler argues that the trial court erred in denying his motion for a new trial, based on ineffective assistance of counsel. The State contends that the trial court correctly denied the motion on its merits but would also have been correct to deny it simply for being untimely. Because the record conclusively shows that Butler was not entitled to relief, we affirm.

The only mechanism for considering an untimely motion for a new trial is to treat it as a collateral attack on the conviction —like a K.S.A. 60-1507 motion. *State v. Jarmon*, 308 Kan. 241, 250, 419 P.3d 591 (2018).

A trial court has three options when handling a K.S.A. 60-1507 motion:

> " '(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.' [Citations omitted.]" *State v. Adams*, 311 Kan. 569, 578, 465 P.3d 176 (2020).

The standard of review depends upon which of these options a trial court used. 311 Kan. at 578.

When the trial court summarily dismisses a K.S.A. 60-1507 motion, an appellate court conducts a de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

A movant bears the burden of establishing entitlement to an evidentiary hearing. To meet this burden, a movant's contentions must be more than conclusory, and either the movant must set forth an evidentiary basis to support those contentions or the basis must be evident from the record. *Thuko v. State*, 310 Kan. 74, 80, 444 P.3d 927 (2019).

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If this showing is made, the court must hold a hearing unless the motion is a second or successive motion seeking similar relief. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014); see also *Littlejohn v. State*, 310 Kan. 439, Syl., 447 P.3d 375 (2019) ("An inmate filing a second or successive motion under K.S.A. 60-1507 must show exceptional circumstances to avoid having the motion dismissed as an abuse of remedy."); *State v. Sprague*, 303 Kan. 418, 425, 362 P.3d 828 (2015) (applying initial pleading requirements when reviewing denial of posttrial, presentencing motion for ineffective assistance of counsel).

***18** The extent of a movant's statutory right to be provided with effective assistance of counsel in a K.S.A. 60-1507 proceeding is a legal question to be reviewed de novo. *Mundy v. State*, 307 Kan. 280, 294, 408 P.3d 965 (2018).

Butler's appellate brief correctly states the procedure for handling an untimely motion for a new trial based on ineffective assistance of counsel. The motion is treated as a K.S.A. 60-1507 motion and the trial court must appoint counsel and hold a hearing unless the motion and the files and records of the case conclusively show that the movant is entitled to no relief. *Jarmon*, 308 Kan. at 250. If the trial court holds a hearing, the defendant has the right to conflict-free counsel. *State v. Sharkey*, 299 Kan. 87, 91, 98-99, 322 P.3d 325 (2014) (holding that it was reversible error for the trial court to allow the allegedly ineffective attorney to argue the ineffective assistance of counsel motion rather than appointing new, conflict-free counsel).

But Butler also argues that he did not validly waive counsel. This argument is peculiar, given his acknowledgment that he would not have a right to counsel if the record shows that he is not entitled to relief, as the trial court found. He may have included it in anticipation of the State's brief. He may have suspected that the State would argue that the trial court's error in not appointing counsel (if error at all) was harmless because Butler was proceeding pro se. But the State made no such argument. It simply asserted that Butler did waive his right to counsel without explaining why such waiver would matter. The motion, files, and record show that Butler is entitled to no relief. Thus, the trial court correctly denied his motion summarily, without appointing counsel, and his waiver of counsel is a nonissue which we need not address.

Butler's motion for a new trial contained two allegations of ineffective assistance of counsel. First, he asserted that "counsel's failure to cross-examine rape victim was ineffective assistance of counsel description of assailant had changed." Second, he compared his first trial and his second trial. His first trial ended in a mistrial when the police officer called as a State's witness referenced his criminal history. Butler complains that counsel at his second trial did not move for a mistrial when two witnesses referenced his criminal history. Butler's appellate brief states: "[T]he record presents other substantial questions of fact about trial counsel's performance" and raises new challenges. But issues not raised before the trial court cannot be raised on appeal. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). Butler's complaints about cross-examination and mistrial will not bear the weight he places on them.

The wording of Butler's claim seems to imply that his counsel did not cross-examine the victim. The record shows that this is not true. His counsel did cross-examine the victim. Butler's claim also is baseless if his argument is construed to mean that his counsel did cross-examine L.K. but did so poorly. Nevertheless, our Supreme Court has explained: " 'It is within the province of a lawyer to decide what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions.' " *State v. Butler*, 307 Kan. 831, 853-54, 416 P.3d 116 (2018) (quoting *Thompson v. State*, 293 Kan. 704, 716, 270 P.3d 1089 [2011]). From the language of the motion, Butler apparently believed that his counsel should have challenged L.K.'s description of her assailant as inconsistent. But the record shows L.K. consistently identifying her assailant, by name, as the man with whom she had been living with for months to her neighbors, to the police, and in testimony. Under the first prong of ineffective assistance of counsel, the record conclusively shows that counsel's performance was not deficient. Counsel had no reason to cross-examine L.K. on her description of her assailant.

***19** Butler's other claim is fatally flawed because it is based on a misunderstanding of procedure. At his first trial, his counsel moved for, and the trial court granted, a mistrial after the State's witness referenced Butler's criminal history. Butler feels that his attorney should have done the same when two witnesses at his second trial mentioned his criminal history. But the first witness to mention Butler's previous incarceration was a defense witness under cross-examination by the prosecutor. The second witness was a defense witness under direct examination by defense counsel. The trial court explained to Butler that these statements came from his own witnesses, they were made when they would not have made

nearly the same impression on the jury, and that if his counsel had moved for mistrial, it would have been denied. The record does not support Butler's contention that his trial counsel's performance was deficient. Further, the trial court's statement that it would have denied a motion for mistrial demonstrates that Butler could not show prejudice from his counsel's failure to move for a mistrial. Thus, the record conclusively shows that Butler would not have been entitled to relief based on ineffective assistance of counsel.

Did cumulative errors deprive Butler of a fair trial?

Butler argues that the cumulative effect of prosecutorial and trial errors deprived him of a fair trial. Because the errors do not require reversal, we affirm Butler's convictions and sentences, except for aggravated kidnapping.

Cumulative trial errors, when considered together, may require reversal of the defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. *State v. Hirsh*, 310 Kan. 321, 345, 446 P.3d 472 (2019). In assessing the cumulative effect of errors during the trial, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. 310 Kan. at 345-46.

If any of the errors being aggregated are constitutional in nature, their cumulative effect must be harmless beyond a reasonable doubt. *State v. Robinson*, 306 Kan. 1012, 1034, 399 P.3d 194 (2017).

When an appellate court finds no errors exist, the cumulative error doctrine cannot apply. *State v. Lemmie*, 311 Kan. 439, 455, 462 P.3d 161 (2020). A single error cannot support reversal under the cumulative error doctrine. *State v. Ballou*, 310 Kan. 591, 617, 448 P.3d 479 (2019); see also *Butler*, 307 Kan. at 868 (citing both no error and single error rules).

Butler argues that the State's "over-charging," prosecutorial error, and ineffective assistance of defense counsel deprived him of his right to a fair trial. He contends that the case was a credibility contest because the State had little physical evidence to support its case. Butler is correct only insofar as to Rissen's testimony and the photographic exhibits, which showed that L.K. did not sustain any significant neck injuries, either from choking or from a knife. Rissen also testified that she did not find any injuries when examining L.K.'s genitals. But that was not the State's only evidence. The State presented DNA evidence showing that the vaginal swab collected semen with DNA consistent with Butler. And the State's exhibits showing the door off its hinges and the ADT system cut off the wall would allow the jury to reasonably infer that L.K. did not invite Butler inside for consensual sex. The prosecutor's exaggeration of L.K.'s testimony during closing argument was harmless error. The other error, related to aggravated kidnapping, can be remedied by simply vacating that conviction. Remand is not necessary. Cumulative error does not provide Butler with relief because any errors identified here, even when combined, are harmless beyond a reasonable doubt given the evidence supporting Butler's convictions.

Did the trial court violate Butler's jury trial rights when it sentenced him?

For the first time on appeal, Butler argues that the trial court violated his Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). He contends that the trial court violated these rights by basing his sentence on his prior convictions without requiring the State to prove those convictions to a jury beyond a reasonable doubt.

***20** But our Supreme Court has held that the use of criminal history to calculate the presumptive prison sentence under the revised Kansas Sentencing Guidelines Act (KSGA) does not violate due process under *Apprendi*. *State v. Sullivan*, 307 Kan. 697, 708, 414 P.3d 737 (2018) (reaffirming *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 [2002]). Butler concedes that *Ivory* rejected the argument he makes here; nevertheless, he "includes it to preserve the issue for federal review."

We conclude that the trial court did not violate Butler's constitutional rights by using his prior convictions to calculate a criminal history score and determine his sentence under the KSGA. See *Sullivan*, 307 Kan. at 708. We are duty-bound to follow our Supreme Court's precedent unless there is some indication that the Supreme Court is departing from its previous position. *Rodriguez*, 305 Kan. at 1144. Because our Supreme Court has given no indication that it is departing from *Ivory*, and every indication that it considers *Ivory* good law, we affirm the trial court's calculation of Butler's criminal history score and its use in calculating Butler's sentence.

Affirmed in part, reversed in part, and vacated in part.

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Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Nicholas D. MARTIN, Appellant.

No. 107,602.
|
Sept. 27, 2013.
|
Review Denied Aug. 28, 2014.

Appeal from Wyandotte District Court; Michael Grosko, Judge.

Attorneys and Law Firms

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

Sheryl L. Lidtke, chief deputy district attorney, Jerome A. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

Before BRUNS, P.J., PIERRON and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** A jury convicted Nicholas D. Martin of five counts of rape, three counts of aggravated criminal sodomy, two counts of aggravated burglary, and one count of theft. On appeal, Martin contends that the district court erred in admitting evidence of his 1990 conviction for rape. Additionally, he contends that four of his convictions for rape were multiplicitous and that three of his convictions for aggravated criminal sodomy were multiplicitous. We find none of his arguments to be persuasive. Thus, we affirm.

FACTS

On June 13, 2011, M.S. lived alone in a ground level studio apartment in Kansas City. At about 2 a.m., she was awakened by an unknown man, clothed only in boxer shorts, rubbing her with his hands. When she rolled over onto her back the man put a knife to her throat. He told her if she made any noise, screamed, or ran for help he would kill her.

He told M.S. to take off her clothes. The man took off his boxers as M.S. complied with his order. Then he inserted his penis, on which he had already placed a condom, into M.S.'s vagina. After a couple of minutes, he stopped after ejaculating into the condom.

After ejaculating, the man got up, sat on the couch, and asked M.S. how old she was. She told him she was 24. He sat on the couch for a minute longer and then decided to lie back down on the bed on his back and next to M.S., who was too scared to move. They lay on the bed for close to 20 minutes until the man, without saying anything, got back on top of M.S. and again inserted his penis into her vagina, this time without a condom. He continued for a couple of minutes until he ejaculated inside of M.S. Afterwards, the man got up to use M.S.'s restroom.

When he came back from the restroom, he lay down on the bed again. Then he asked M.S. to suck on his penis. Crying, M.S. did as told for a couple of minutes until he told her to stop. At that point M.S. and the assailant just laid on the bed, M.S. shaking and in shock. From thereafter, M.S. lost track of the order in which the man sexually violated her. She did testify she knew that he raped her five times—once in her anus, four times in her vagina, and she knew that he asked for oral sex twice.

She was certain that he inserted his penis into her anus at some point between the two incidents of oral sex. M.S. testified that she was lying on the bed when he asked her if she "liked it in her butt"; she said no and that it hurts, but he told her to get up. He then got behind her and squeezed what sounded like a bottle of lotion, putting some on her anus and some on his penis. After inserting his penis into M.S.'s anus for a couple of minutes, he stopped.

M.S. could not recall if the man then inserted his penis into her vagina or ordered more oral sex. She did not think the man ever ejaculated again, but she did specifically remember that

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the very last thing he did before getting dressed and leaving through her front door was insert his penis into her vagina. After he left, M.S. wrapped herself up in a towel and called her sister. When her sister arrived at around 6 a.m., M.S. then called the police. Shortly thereafter police and an ambulance took M.S. to the hospital where she consented to a rape kit examination.

***2** The next day, around 2 a.m. on June 14, 2011, K.S. was awakened by a noise coming from inside her newly rented home in Kansas City, which was about a mile away from M.S.'s apartment. She grabbed a small flashlight and went to shut the windows. When she shined the flashlight into the kitchen, she saw a man holding a knife. She dropped the flashlight and said, "[O]h, god, please don't hurt me."

The man walked towards her, telling her to shut up. He backed her into an empty bedroom and asked who else lived there. She told him that she lived alone. He ordered her to her bedroom and onto her bed. He sat down across from K.S. on top of some boxes filled with decorations for her upcoming wedding. The man said, "Here's what's about to happen, ... I'm about to fuck you and take your stuff. As long as you do what I say [a]nd don't hesitate, I won't hurt you."

He ordered K.S. to remove her clothes, and she did. After he put the knife on the dresser, he removed his clothes, took a condom out of his pocket, and told K.S. to put it on his erect penis. When she finished, he told her to spread her legs, and he inserted his penis into her vagina. He continued to rape her from the top, telling her to stop crying; then he ordered her to flip over and continued to vaginally rape her from behind. At some point, he flipped her back over. K.S. testified that he stopped after about 45 minutes, but she was not sure if he ever ejaculated. After he stopped, he went back and sat on the box of wedding decorations.

He told K.S. to put her clothes back on. She did, and she asked him what he wanted. He said he was thirsty and ordered K.S. to follow him into the kitchen where he removed a Sprite from the refrigerator. They went back to the bedroom and he sat on the box, drank the Sprite, and asked K.S. questions about herself. He told K .S. he was tired; she said he could sleep there and she asked if she could leave. He said she could, and he asked where her money was. K.S. got $15 from her purse and slid it across her dresser. Then she left her house, went to her fiance's, and called the police. She met police at the hospital where she submitted to a rape examination.

Law enforcement officers conducted a thorough investigation of M.S.'s apartment and K.S.'s house. At the outset, they noted that window screens on K.S.'s house had been cut. A plethora of forensic evidence linked Nicholas D. Martin to the crimes. DNA recovered from both M.S. and K.S. matched Martin; a fingerprint on the Sprite can matched Martin's prints; a serial number from an Xbox system that Martin pawned on June 15 matched the serial number of the Xbox system that K.S. noticed was missing from her house upon her return. Additionally, when officers arrested Martin, they found a pawn ticket for the Xbox, a knife, and tattoos on Martin resembling the ones that K.S. described her assailant as having. Suffice it to say, there is no dispute that Martin was in the residences of M.S. and K.S. and that sexual intercourse took place.

***3** Martin testified in his defense. He did not deny that he had sex with M.S. and K.S. in their residences, but he claimed it was all consensual. Martin claimed he had been casually having sex with M.S., who lived across from him, for a couple of weeks. On the night of June 13, he was living on the streets and only had sex with M.S. so he could take a shower and sleep. After M.S. consented to the various sex acts, Martin told her he would not be able to see her anymore because his girlfriend was pregnant. This angered a jealous M.S. Apparently, Martin's girlfriend had often told him that she had noticed M.S. looking at her funny.

As to K.S., Martin testified that the day after leaving M.S.'s apartment, he hung out around the library selling drugs. He still had some drugs left that night, and K.S. approached him in her car to purchase some crack. Hours later, at about 1:30 a.m., K.S. returned and wanted more crack. But because she did not have any more money, she offered to have sex with Martin as payment. He agreed because he thought it would give him a bed to sleep in that night.

According to Martin, K.S. took him home and they had sex. Unfortunately, he only had one large piece of crack left and the sex was not enough to pay for it. So K.S. gave him her Xbox. K.S. then went into the bathroom to flush the condom, and she discovered that what Martin had given her was soap —not crack. She argued with him about it, angrily, and told him that she was not going to let him get away with it.

Anticipating Martin's consent defense, the State presented evidence of Martin's prior conviction for rape, to which Martin objected. In 1990, Martin entered A.M.'s ground-level apartment by cutting a hole in a window screen. He woke up

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A.M. at around 3 a.m. and put a knife to her throat. When she screamed, he said if she made another noise he would kill her. He then inserted his penis into A.M.'s vagina for about 30 or 40 minutes until he ejaculated. Martin did not deny any of this. He claimed that he pleaded guilty in that case because he needed to pay for his crime.

At the conclusion of the 4–day trial, the district court instructed the jury as to the charges against Martin. The jury deliberated and returned a verdict of guilty on all counts: two counts of aggravated burglary, five counts of rape, three counts of aggravated criminal sodomy, and one count of theft.

The district court sentenced Martin on January 6, 2012. All Martin's sentences were run consecutive and the district court invoked the double rule to Martin's base rape sentence, which was 406 months. Accordingly, Martin was sentenced to a total of 812 months—the maximum sentence allowed by law. Martin timely appealed his convictions and sentences.

ANALYSIS

1990 Rape Conviction

Martin argues that the district court erred in admitting evidence of his 1990 rape conviction. Generally, the admission of prior crimes evidence under K.S.A.2010 Supp. 60–455 involves multiple determinations subject to differing standards of review. Our standard of review to determine if evidence is material is unlimited. But we review whether evidence was probative or relevant for an abuse of discretion. Similarly, we review a district court's finding that the probative value of the evidence outweighs its prejudice under an abuse of discretion standard. *State v. Inkelaar,* 293 Kan. 414, 424, 264 P.3d 81 (2011).

***4** K.S.A.2010 Supp. 60–455(d), which was the version applicable in Martin's case, provides:

> "Except as provided in K.S.A. 60–445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or K.S.A. 21–5401 through 21–5609, 21–6104, 21–6325, 21–6326, or 21–6418 through 21–6421, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

The Kansas Supreme Court recently interpreted 60–455(d) in *State v. Prine,* 297 Kan. 460, 303 P.3d 662 (2013) holding:

> "Under the plain language of K.S.A.2009 Supp. 60–455(d), the legislature carved out an exception to the prohibition on admission of certain types of other crimes and civil wrongs evidence to prove propensity of a criminal defendant to commit the charged crime or crimes for sex crime prosecutions. As long as the evidence is of 'another act or offense of sexual misconduct' and is relevant to propensity or 'any matter,' it is admissible, as long as the district judge is satisfied that the probative value of the evidence outweighs its potential for undue prejudice." 297 Kan. 460, Syl. ¶ 3.

Accordingly, the statute itself makes propensity evidence in sex offenses material. And as Martin concedes, evidence of the prior rape in 1990 was relevant to show his propensity to commit rape.

As the district court appropriately noted, Martin's prior rape conviction was particularly relevant and probative because the facts of the 1990 rape are analogous to the facts of the current case. In 1990, Martin was convicted of breaking into a ground floor apartment in the middle of the night, waking up a woman living alone in the apartment, threatening her life at knifepoint, and raping her. Similarly, M.S. and K.S.—who both lived alone—alleged that Martin broke into their residences (a ground floor apartment and a home with ground level windows) in the middle of the night, threatened their lives with a knife, and raped them.

Because the 1990 rape was so similar to the allegations in the present case, we find that the district court did not abuse its discretion in finding that the evidence was admissible. Likewise, we find that the relevance of the evidence outweighs its potential for undue prejudice. We, therefore, conclude that the district court did not commit

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error in admitting evidence of the 1990 rape conviction under K.S.A.2010 Supp. 60–455(d).

Multiplicity

Martin contends that three of his convictions for raping M.S. were multiplicitous. Likewise, he contends that two of his convictions for committing aggravated criminal sodomy on M.S. were multiplicitous. In response, the State contends that the incidents of rape—as well as the incidents of aggravated criminal sodomy—were separated by time, intervening events, and fresh impulses.

***5** "The issue of multiplicity is a question of law, and this court's review is unlimited. [Citations omitted]. In addition, questions of statutory interpretation and construction, on which multiplicity turns, are reviewed de novo on appeal," *State v. Sellers,* 292 Kan. 346, 356–57, 253 P.3d 20 (2011). Multiplicity occurs when a complaint charges multiple counts for what is a single offense. 292 Kan. at 357; *State v. Schoonover,* 281 Kan. 453, Syl. ¶ 11, 133 P.3d 48 (2006). "Multiplicitous convictions violate a defendant's rights under both the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights because they constitute multiple punishments for a single offense." *State v. Weber,* 297 Kan. ——, Syl. ¶ 1, 304 P.3d 1262 (2013).

Here, a jury convicted Martin for raping M.S. four times. As the district court instructed the jury, K.S.A.2010 Supp. 21–3502(a)(1) defined rape as "[s]exual intercourse with a person who does not consent to the sexual intercourse ... when the victim is overcome by ... fear." Martin was also convicted of three counts of aggravated criminal sodomy against M.S. Under K.S.A.2010 Supp. 21–3506(a)(3)(A) aggravated criminal sodomy occurs when a person commits sodomy or causes another to commit sodomy without consent when the victim is overcome by fear.

K.S.A. 21–3501(2) defined sodomy as

> "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal ."

To analyze Martin's claims, we utilize a two-part test: ' "(1) Do the convictions arise from the same conduct and, if so, (2) by statutory definition are there two offenses or only one?' " *Sellers,* 292 Kan. at 357 (quoting *State v. Thompson,* 287 Kan. 238, 244, 200 P.3d 22 [2009]). If Martin's conduct supporting each conviction was distinct—not unitary—under the first prong, then we need not address the second prong of the analysis. See 292 Kan. at 357.

In determining if the sexual acts leading to Martin's convictions were unitary or distinct, we look to the following factors: "(1) whether the acts occurred at or near the same time, (2) whether the acts occurred at the same location, (3) whether a causal relationship existed between the acts, in particular whether an intervening event separated the acts, and (4) whether a fresh impulse motivated some of the conduct." *Weber,* 297 Kan. ——, Syl. ¶ 3.

As to the first factor, the record reveals that M.S. was the victim of illegal sexual acts committed by Martin over the course of 4 hours. As to the second factor, the record reveals that Martin committed each of the illegal sexual acts against M.S. in the bedroom area of her studio apartment. As is often the case, however, the last two factors of our analysis are much more complicated. See *Sellers,* 292 Kan. at 359–60.

***6** As to the third factor, a review of the record reveals that there were intervening events that separated each of the rapes committed in M.S.'s apartment over the 4–hour period. Similarly, as to the fourth factor, there is evidence in the record of fresh sexual impulses that motivated Martin to perform additional rapes or commit other illegal sexual acts. Because the unity analysis is dependent on the sequence of events, we will deal with each of Martin's multiplicity claims as they arose according to the evidence at trial.

Unlike K.S., who testified as to one continuous rape over 45 minutes, M.S. testified that she was raped by Martin five times—four vaginal penetrations and one anal penetration—over the course of 4 hours. Significantly, M.S. testified that there was a break of 10 to 20 minutes between each rape. And during these breaks, M.S. testified that Martin used the restroom on three or four occasions, sat on the couch, lay on

the bed, smoked at least two cigarettes, drank a bottle of water, and talked to M.S. about a variety of things.

Understandably, M.S. had difficulty specifically recalling the exact details of the multiple sexual assaults that she endured during the 4 hours that Martin was in her apartment. The following timeline of events is based on her testimony at trial and assists with the unity prong of the multiplicity analysis:

- Martin awakened M.S. in her apartment around 2 a.m. and put a knife to her throat.
- *Rape* 1–Martin told M.S. to take off her clothes and he inserted his penis into her vagina. He continued for a couple of minutes until he ejaculated into a condom.
- *Intervening event*-Martin then got up and sat on the couch. He asked M.S. how old she was. About a minute later, Martin moved back to the bed and lay there, naked, for about 20 minutes.
- *Rape 2*–After lying on the bed, Martin got on top of M.S. and again inserted his penis into her vagina, this time without a condom. Martin stopped when he ejaculated inside of M.S.
- *Intervening event*-Martin got up to use M.S.'s restroom for the first time.
- *Aggravated Sodomy, Oral 1*–After returning from the bathroom, Martin lay on the bed and asked M.S. to suck his penis. M .S. complied for a couple of minutes, crying, until Martin told her to stop.
- *Intervening* event-M.S. and Martin laid on the bed for a couple of minutes. Martin then asked M.S. if she liked it in her butt. She said no.
- *Aggravated Sodomy, Anal Rape*–Martin told M.S. to get up. He stepped behind her and put lotion on her anus and his penis and then inserted his penis into her anus. After a couple of minutes, "[h]e just stopped."

From the timeline, two of Martin's rape convictions were clearly not unitary conduct and not multiplicitous. Additionally, two of Martin's convictions for aggravated criminal sodomy were not unitary conduct and not multiplicitous. We now must address Martin's two remaining convictions of vaginal rape and one remaining conviction for aggravated criminal sodomy based on forced oral sex.

***7** First, we will address the two remaining counts of vaginal rape. Although the record contains few details as to the remaining two rape convictions, the record does support convictions for the two counts. M.S. remembered that the last thing Martin did before he left was insert his penis into her vagina. So Martin must have inserted his penis into M.S.'s vagina after sodomizing her multiple times. Conduct is not unitary when sex acts are "separated from each other by other sexual acts." *State v. Howard,* 243 Kan. 699, 703, 763 P.2d 607 (1988). So even if Martin forced vaginal intercourse immediately following the last oral sodomy, the fourth sequential rape conviction stands—either the sodomies or Martin's use of the restroom after the second vaginal rape were intervening events.

The third sequential rape is more difficult, but the record supports the conviction. We know from M.S.'s testimony that there was a 10–to 20–minute break between each rape. A 10– or 20–minute break can amount to an intervening event or a break requiring a fresh impulse to begin another sex act. See *Sellers,* 292 Kan. at 359 (noting that while breaks of a few minutes are not always enough to demonstrate a fresh impulse, checking on a dog amounted to a sufficient intervening event). This is a close call considering that M.S. could not specifically remember what Martin did during the break.

Nonetheless, M.S. testified that there was a break, and she testified that Martin did a variety of things during these breaks: he smoked cigarettes, drank a bottle of water, talked to her, and used the bathroom multiple times. Even though she did not explicitly say which of these things he did during the break just before the third time he vaginally raped her, the jury could infer from the evidence that he did something during the break. As such, Martin's third sequential conviction for rape did not arise from conduct in unity with any other rape. Therefore, the conviction stands.

Oral and Anal Sodomy

Lastly, we must address Martin's remaining count of aggravated criminal sodomy arising under K.S.A.2010 Supp. 21–3506. M.S. could not remember if after Martin anally sodomized her, he vaginally raped her or forced her to perform oral sex. Because anal sodomy and oral sodomy arise under the same statute, and because we cannot be certain from the record that Martin did not force oral sodomy after anally sodomizing M.S., there is a possibility

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this conduct was unitary. Given the possibility of unitary conduct, we will address the unit of prosecution test, which requires a determination as to whether the legislature intended oral sodomy to be a separate offense from anal sodomy. *Schoonover,* 281 Kan. at 496–97.

The unit of prosecution test asks: "How has the legislature defined the scope of conduct which will comprise one violation of the statute? ... There can be only one conviction for each allowable unit of prosecution." *Schoonover,* 281 Kan. at 497–98; *accord* *Thompson,* 287 Kan. at 245. A unit of prosecution is dependent on the scope of the conduct proscribed rather than on a single physical action or a single victim. *State v. Sprung,* 294 Kan. 300, 308, 277 P.3d 1100 (2012). Thus, this court must analyze the plain language of the sodomy statute, giving common words their ordinary meaning, to determine the legislature's intended unit of prosecution. See *State v. Urban,* 291 Kan. 214, 216, 239 P.3d 837 (2010).

***8** Here, K.S.A.2010 Supp. 21–3506(a)(3)(A) prohibited sodomy when accomplished by fear and without consent. Moreover, K.S.A. 21–3501(2) defined sodomy as

> "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal ."

In *Sprung,* the Kansas Supreme Court found only one unit of prosecution for aggravated indecent liberties with a child. The defendant had been convicted of two counts, one for touching a child and one for having the child touch him. Significant to its analysis was the fact that the legislature in K.S.A. 21–3504(a)(3)(A) did not separate the acts—"[a]ny lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both"—into separate subsections. 294 Kan. at 310–11; see also *State v. Gadbury,* No. 102,024, 2011 WL 135019, at *13 (Kan.App.2011), *rev. denied* 292 Kan. 967 (2011) (finding a single unit of prosecution under K.S.A. 21–3501(2) for two counts of anal sodomy based on one penetration by a body part and one penetration by an object). We recognize that, here, oral and anal sodomy are both in the same subsection.

Nevertheless, unlike the statutory language analyzed in *Sprung*—which had no punctuation between the acts leading to the convictions—the legislature chose to separate the definitions of oral and anal sodomy with semicolons. See K.S.A. 21–3501(2). A semicolon separates *independent clauses* and is used to indicate a strong break in a sentence. See Bryan A. Garner, The Redbook: A Manual on Legal Style, 13 (3d ed.2013). By using a semicolon, we find the legislature clearly intended to distinguish oral sodomy and anal sodomy as separate units of prosecution. Moreover, we find that *Sprung,* taken with other precedent, supports this result.

The Kansas Supreme Court has interpreted K.S.A. 21–3501(2) under an alternative means analysis. In *State v. Stafford,* 296 Kan. 25, 52, 290 P.3d 562 (2012), the Kansas Supreme court found that K.S .A. 21–3501(2) created three alternative means to commit sodomy: "(1) oral contact of genitalia, (2) anal penetration, and (3) sexual intercourse with an animal." Significantly, it noted that "each act described within the definition of sodomy is separate and distinct from the other—the acts are factually different from one another, and one act is not inclusive of the others. Furthermore, *each act is separated by a semicolon,* which suggests that the legislature intended for each act to constitute a specific means of completing the general act of sodomy." (Emphasis added.) *Stafford,* 296 Kan. at 52.

In an alternative means analysis, the separation of acts into different subsections is an important clue that the legislature intended to create alternative means. See *State v. Brown,* 295 Kan. 181, Syl. ¶ 8, 284 P.3d 977 (2012). In the unit of prosecution analysis in *Sprung,* the court relied on the *absence* of the separate-subsection clue and found only a single unit of prosecution.

***9** In *Stafford,* a semicolon—like a separate subsection—revealed legislative intent to create alternative means. And the same statute at issue in the present case created alternative means. 295 Kan. at 52. It follows that the semicolon clue in

K.S.A. 21–3501(2) dictates a result in this case that is the opposite of *Sprung.* The semicolons in K.S.A. 21–3501(2) are a clear clue that the legislature intended to create three distinct units of prosecution.

Moreover, based on the common and ordinary meanings of the words used in the statute, oral contact with genitalia, anal penetration, and sexual intercourse with an animal are three very different sexual acts. We therefore hold that the plain language of K.S.A. 21–3501(2) created one unit of prosecution for oral contact with genitalia, one unit of prosecution for anal penetration, and one unit of prosecution for copulation with an animal. As such, regardless of when Martin forced M.S. to perform oral sex, his remaining conviction for aggravated criminal sodomy was not multiplicitous.

Accordingly, we conclude that none of Martin's sexual assaults of M.S. were multiplicitous, and we affirm his convictions.

Affirmed.

All Citations

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253 P.3d 385 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Hugo AGUILERA, Appellant.

No. 103,575.
|
June 24, 2011.
|
Review Denied Feb. 17, 2012.

Appeal from Ford District Court; E. Leigh Hood, Judge.

Attorneys and Law Firms

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Josh Seiden, assistant county attorney, Terry J. Malone, county attorney, and Steve Six, attorney general, for appellee.

Before PIERRON, P.J., ATCHESON, J., and LARSON, S.J.

MEMORANDUM OPINION

PER CURIAM:

***1** This is Hugo Aguilera's direct appeal from his jury convictions of two counts of rape, severity level 1 person felonies; one count of aggravated criminal sodomy, a severity level 1 person felony; and two counts of domestic battery, class B person misdemeanors.

Aguilera alleges: (1) The giving of improper jury instructions during the initial phase of the jury trial; (2) prosecutorial misconduct during closing argument in misstating the law as to reasonable doubt; and (3) the two rape charges were multiplicitous, improperly pled, confusing, and detrimental to him by arguing there were separate acts of rape.

The record reflects the following facts and legal proceedings.

In January 2009, Aguilera was first charged with one count of rape. The complaint was later amended to charge two counts of rape, one count of aggravated criminal sodomy, and three counts of domestic battery. Aguilera pled not guilty to all charges, and the case proceeded to a jury trial in September 2009.

After the jury was impaneled, but before the State gave its opening statement, the trial court gave instructions to the jury which included the following comments:

> "When you receive this case at the conclusion of all the evidence, please keep in mind that the attitude and conduct of the jurors at the outset of their deliberations are matters of considerable importance. It is rarely helpful for the juror upon entering the jury room to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. The result of the conduct of this nature might be that a juror because of personal pride would hesitate to retreat from an announced position when it is shown that it is felicitous. When deliberating it is natural that differences of opinion will arise. When they do, each juror should not only express their opinion but the facts and reasons upon which it is based.
>
> "Although a juror should not hesitate to change his or her vote when his or her reason and judgment are changed, each juror should vote according to his or her honest judgment applying the law from the instructions to the facts as proved. If every juror is fair and reasonable a jury can almost always agree. It is your duty as jurors to consult with one another and to deliberate with the view to reaching an agreement if you can do so without violation to your personal judgment."

No objection was made at trial to the court's statement.

D.A. testified that in January 2009, she was still married to Aguilera but they had been separated off and on in 2008 and 2009. Aguilera was not living with D.A. when early in the morning on January 22, 2009, he returned to the house where she and their children were living and asked to come in. D.A. initially refused because it was too late but eventually allowed Aguilera to come in to say goodbye to his children before leaving for Houston.

They sat in separate areas and discussed various matters, including her filing for divorce. Aguilera told DA. this would

be their last chance to have sexual relations, but she refused and told him to leave. He continued asking for sex, and she refused. He asked for a ride, and she refused to leave the children alone to take him. They then argued about who was to sleep where and Aguilera finally decided he would sleep on the sofa and D.A. would sleep with the children.

***2** D.A. testified that when she was on her way to the children's room, Aguilera grabbed her, lifted her up, and placed her on the sofa. She demanded to be released, but he pushed her shoulders and would not release her. Aguilera then leaned over her, put his left hand underneath her pants and underwear, and touched her vagina. With his other hand, he covered her mouth and nose. Aguilera forced his fingers inside D.A.'s vagina without her permission and continued to move his fingers around inside her. He continued to do so for some time, but she was not exactly sure how long.

D.A. managed to push Aguilera's hand away from her face. He then removed his other hand from her vagina, stripped her of her pants and underpants, began masturbating, and then forced her close to him and penetrated her vagina with his penis. D.A. testified Aguilera's penis was inside her for roughly a minute. He then pried her legs apart and proceeded to lick and suck her vagina for what she believed to be about a minute. He then removed his face from her lap and reinserted his penis in her vagina, saying to let him "finish," and he continued until he ejaculated into her vagina.

At this point, Aguilera let D.A. up. She grabbed her clothes, went into a bedroom, locked the door, and cleaned herself up. D.A. then got the children up and put them into her car. They had a disagreement over him being there and after a short drive, she returned to her house, dropped him off, and drove to the house of her friend, Maria Andrate. Later that morning, D.A. took the children to school and then went to the police department to report what had happened.

D.A. went to the hospital and was examined by a nurse on January 22. The nurse took swabs and collected physical evidence, including D.A.'s clothing. The nurse also conducted a pelvic examination on D.A. during which she found an abrasion of D.A.'s labia. The nurse testified that this type of abrasion is uncommon during consensual sex. The nurse also conducted a physical examination and discovered bruising on D.A.'s left arm which looked like a grasping-type injury.

The cervical swabs were tested and showed seminal fluid matching Aguilera's DNA as did D.A.'s underpants.

D.A. also testified at trial to several other instances where Aguilera had hurt her, but the domestic battery convictions are not in issue in this appeal.

Additionally, a Dodge City police officer testified that during her interview with Aguilera, he said D.A. had told him she did not want to have sex but that he had made her have sex. The officer also testified Aguilera said that whatever D.A. said was true.

Aguilera testified at trial that he had sex with D.A. on January 21 or 22, but that the sex was consensual. He testified he did not have oral sex with D.A. He maintained that D.A. did not tell him "no." He further testified that he never used force during the sexual encounter.

During closing argument, the State made the following statement, to which no objection was made:

> ***3** "The elements of the crime, three or four things you have to show to find the defendant guilty of each crime, that's what you have to determine beyond a reasonable doubt. You don't have to determine if this happened necessarily beyond a reasonable doubt if there's [*sic*] different versions of whether something did or didn't happen or minor things, those are not elements of the crime. The things that you have to find beyond a reasonable doubt are the elements of the crime. So please keep that in mind when you're back in the jury room deliberating."

The jury deliberated over 4 hours, asked several questions, and found Aguilera guilty of two counts of rape, the one charged count of aggravated criminal sodomy, and two counts of domestic battery. Aguilera was found not guilty of one count of domestic battery.

Aguilera was sentenced to 155 months in prison for the first rape charge, 155 months in prison for the second rape charge to run concurrent with the first rape charge, and 155 months in prison for the aggravated criminal sodomy conviction, again concurrent to the other charges. Finally, Aguilera was

sentenced to two consecutive 6–month sentences for the domestic battery convictions to run concurrent to the other sentences.

Aguilera has timely appealed. We will consider Aguilera's arguments in the order raised.

Aguilera first argues the trial court committed reversible error in giving a modified *Allen-type* instruction to the jury after jury selection had been completed. See *Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

The standard of review depends on whether the defendant has raised a timely objection to the instruction. Aguilera contends that because of the initial nature of the instruction given to the jury, he was not afforded an opportunity to object to the court's language. We do not agree.

Aguilera and his counsel were present at the time the court spoke to the jury. He could have raised an objection during the instruction or if uncomfortable in stopping the court, he could have lodged an objection when the court was done with the instructions.

> "An appellate court reviewing a district court's giving or failure to give a particular instruction applies a clearly erroneous standard where a party neither suggested an instruction nor objected to its omission. See K.S.A. 22–3414(3). An instruction is clearly erroneous only if the reviewing court is firmly convinced there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred. [Citation omitted.]" *State v. Martinez,* 288 Kan. 443, 451–52, 204 P.3d 601 (2009).

We need not again set forth the language which was included in our factual statement. Aguilera contends the trial court's language is simply a modified but erroneous *Allen*-type instruction. An *Allen*-type instruction instructs the jury towards reaching a unanimous verdict. Kansas courts have on several occasions disapproved of *Allen*-type instructions containing language telling the jury that the case must be decided, that an additional trial would be a burden on both sides, and that there is no reason to believe another jury would be better situated to decide the case. *See State v. Scott–Herring,* 284 Kan. 172, 180, 159 P.3d 1028 (2007).

***4** But, the exact language used by the trial court in this case was the subject of review in *State v. Cofield,* 288 Kan. 367, 374–75, 203 P.3d 1261 (2009). The language mirrors that of PIK Civ.3d 101.89. Our Supreme Court has found the language of the instruction is "a fair statement concerning ... the proper attitude which jurors should maintain." *State v. Hall,* 220 Kan. 712, 718, 556 P.2d 413 (1976). Our Supreme Court has found in several cases that the language is not coercive. *Cofield,* 288 Kan. at 376, *State v. Cummings,* 242 Kan. 84, 90–91, 744 P.2d 858 (1987).

In this case, the language was not coercive. The language was not prejudicial. The language was appropriate, and in giving it, the trial court did not act improperly or commit error.

Aguilera further argues the State committed prosecutorial misconduct by making improper and legally erroneous statements regarding reasonable doubt. The precise statement which is deemed erroneous has been fully set forth as a part of the factual and procedure statement.

While there was no objection to the State's closing argument, a claim of prosecutorial misconduct during closing argument may be brought on appeal even absent a contemporaneous objection. *State v. King,* 288 Kan. 333, 349, 204 P.3d 585 (2009).

Appellate review of an allegation of prosecutorial misconduct involving improper comments to the jury requires a two-step analysis. First, the appellate court decides whether the comments were outside the wide latitude that the prosecutor is allowed in discussing the evidence. Second, if misconduct is found, the appellate court must determine whether the improper comments constitute plain error; that is, whether the statements prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. McReynolds,* 288 Kan. 318, 323, 202 P.3d 658 (2009).

The State commits prosecutorial misconduct where it improperly states its burden of proof. *State v. Magallanez,* 290 Kan. 906, 914–15, 235 P.3d 460 (2010). Additionally, Kansas courts have admonished prosecutors against defining reasonable doubt, finding that the words themselves are the best explanation of the words. See *State v. Brinklow,* 288 Kan. 39, 49–50, 200 P.3d 1225 (2009).

The prosecutor's statement which is claimed to be reversible error was not an attempt to define reasonable doubt. The language is somewhat confusing but it appears to be an attempt to tell the jury what elements of the crime must be proved beyond a reasonable doubt but that the same standard does not apply to factual differences that are not elements of the charged crime. The State argues the language should be characterized only as comments on the evidence and should fall within the wide latitude such statements should be given. See *McReynolds,* 288 Kan. at 325.

However, while the statements were framed in terms of which elements had to be proven beyond a reasonable doubt, the wording was confusing enough to cast a question on what reasonable doubt meant. The State told the jury, "You don't have to determine if this happened necessarily beyond a reasonable doubt if there's [*sic*] different versions of whether something did or didn't happen or minor things, those are not elements of the crime." It appears the prosecutor was telling the jury that it could disagree as to facts not related to the elements of the crime. But, it is troubling for a jury to be told in a "she said/he said" rape prosecution that if there are different versions of whether something did or did not happen that reasonable doubt is not implicated.

***5** This statement is as much confusing as improper, and confusion is often more to the benefit of a defendant than to the State. However, even if found to be improper, this statement does not violate the second step of the two-step prosecutorial misconduct analysis. We are taught to consider three factors: (1) Whether the misconduct was gross and flagrant; (2) whether the misconduct showed ill will on the prosecutor's part; and (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have little weight in the minds of the jury. None of these three factors is individually controlling. *McReynolds,* 288 Kan. at 323.

Comments have been held to be gross and flagrant where a prosecutor commented on defendant's refusal to testify, *State v. Kemble,* 291 Kan. 109, 123–24, 238 P.3d 251 (2010), or called opposing counsel a liar. *State v. Magdaleno,* 28 Kan.App.2d 429, 437, 17 P.3d 974, *rev. denied* 271 Kan. 1040 (2001). In contrast, our court found no gross and flagrant conduct where the prosecutor improperly commented on reasonable doubt. *State v. McMillan,* 44 Kan.App.2d 913, 922, 242 P.3d 203 (2010), *rev. denied* 291 Kan. —— (2011). The prosecutor's comment here was not gross and flagrant.

Further, there was no evidence the prosecutor acted out of ill will as was found in *Brinklow,* 288 Kan. at 50. Our court has on several occasions found that where there is a single misstatement as to reasonable doubt and a clear and correct standard in the jury instruction, no ill will is shown. *McMillan,* 44 Kan.App.2d at 923–24; *State v. Jackson,* 37 Kan.App.2d 744, 751, 157 P.3d 660, *rev. denied* 285 Kan. 1176 (2007).

The jury instruction was referenced by the prosecutor's statement and it clearly and correctly provided, "If you have reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty." There is no evidence in the record that the prosecutor showed ill will in the statement as to the burden of proof.

Finally, it is frequently difficult to say that the evidence is of a direct and overwhelming nature in a classic "she said/ he said" rape trial. But, if that inherent conflict was resolved against Aguilera, all of the other evidence corroborated D.A.'s testimony. And, most damaging to the defendant were the admissions he made in his interview with the Dodge City police.

While we hesitate to clearly hold the prosecutor's burden of proof statement was misconduct, even if it was so characterized, it would have been harmless error and not entitle Aguilera to any relief.

Aguilera next argues that the two counts of rape were multiplicitous and improperly pled by the State. He argues it was constitutionally improper to subject him to the potential for multiple punishments for a single offense by charging him with identical language of two counts of rape. He also maintains he was denied a fair trial because the amended complaint was vague and did not give him notice of the acts for which he was being prosecuted.

***6** The State argues it was proper to convict Aguilera of two counts of rape because they were separate incidents. The State contends the evidence showed two different penetrations, one digital and one penile, and the jury was properly instructed, without objection, that one count related to penetration by Aguilera's penis and the other to penetration by Aguilera's finger or fingers.

We will quote extensively from *State v. Schoonover,* 281 Kan. 453, 462, 133 P.3d 48 (2006), which holds: "The issue of whether convictions are multiplicitous is a question of law subject to unlimited review."

Aguilera intertwines his multiplicity argument with claims that this is a multiple acts situation in which he was improperly charged, tried, and convicted.

A multiple acts issue is related but not the same as the multiplicity issue Aguilera raises here. In a multiple acts case, several acts are alleged, any one of which could constitute the single crime charged. In such a case, the State must elect or the court must give a unanimity instruction and the jury must unanimously decide which act or incident constitutes the crime. A multiple acts issue involves a defendant's right to a unanimous jury. *See* *State v. Voyles,* 284 Kan. 239, 244, 160 P.3d 794 (2007). Multiplicity, on the other hand, involves the charging of a single offense in multiple counts of a complaint or information. It creates a potential for a defendant to receive multiple punishments for a single offense which would violate the defendant's constitutional right to be free from double jeopardy. *Schoonover,* 281 Kan. at 475.

To determine if a multiple acts issue is involved, a court must first decide whether the conduct constitutes one act or separate and distinct multiple acts, which is essentially the same as the first step of the multiplicity analysis. Compare *Voyles,* 284 Kan. at 244 (threshold determination in multiple acts analysis is whether defendant's conduct is part of one act or represents separate and distinct acts) with *Schoonover,* 281 Kan. at 496–97 (first component of multiplicity analysis requires determination of whether charged conduct is discrete or unitary); see also *State v. Foster,* 290 Kan. 696, 713, 233 P.3d 265 (2010) (applying *Schoonover* factors for determining if conduct unitary under first step of multiplicity inquiry to multiple acts analysis); *State v. Rivera,* 42 Kan.App.2d 1005, 1014–15, 219 P.3d 1231 (2009), *rev. denied* 290 Kan. 1102 (2010) (same). The answer to this threshold determination controls which issue is involved: If the conduct constitutes separate and distinct acts, there may be a multiple acts problem; if the acts are unitary, there may be a multiplicity problem. By arguing his conduct was unitary, Aguilera effectively admits he is not raising a multiple acts issue.

Although Aguilera did not raise the multiplicity issue to the trial court, exceptions to the rule which preclude appellate rule have often been applied to consider multiplicity issues for the first time on review to serve the ends of justice and prevent the denial of a fundamental right. See, *e.g.,* *State v. Nguyen,* 285 Kan. 418, 433, 172 P.3d 1165 (2007); *State v. Simmons,* 282 Kan. 728, 743, 148 P.3d 525 (2006).

***7** *Schoonover's* analysis summarized the multiplicity inquiry as involving two components, both of which must be met to find a double jeopardy violation: "(1) Do the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one?" 281 Kan. at 496.

The first component of the multiplicity inquiry requires a court to determine if the conduct is discrete, "*i.e.,* committed separately and severally," or unitary, *i.e.,* "the charges arise from the same act or transaction." 281 Kan. at 496–97. If the conduct is discrete, there is no double jeopardy violation; if unitary, the second component must be analyzed to determine if the convictions arise from the same offense. 281 Kan. at 496.

Turning to the second component when, as here, the double jeopardy issue arises from convictions on multiple counts for violations of the same statute, the court must determine what the allowable unit of prosecution is under the statutory definition of the crime. 281 Kan. at 497–98. "[T]he test is: How has the legislature defined the scope of conduct which will comprise one violation of the statute?" 281 Kan. at 497. Only one conviction per unit of prosecution is allowed. 281 Kan. at 497–98.

In determining whether the events arose from the same conduct, *Schoonover* identified the following four factors to be considered:

> "(1) [W]hether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. at 497.

We understand, but do not agree with, the State's argument that Aguilera's commission of aggravated criminal sodomy was an intervening event and placing his penis back into D.A.'s vagina so he could "finish" was a fresh impulse which prevents a finding that his actions were unitary.

Under our facts, the two rape convictions arise from the same course of conduct. The acts occurred at the same time and at the same location. D.A.'s testimony described the acts as immediately following one after the other. All of Aguilera's actions were in furtherance of his stated goal of having sexual intercourse with D.A. and were taken within only a few minutes in order to accomplish his intended purpose. All of his actions occurred and arose from the same unitary conduct.

Our case is different factually from *State v. Sellers,* 292 Kan. 117, 253P.3d 20 (2011), slip op. at 18, where unitary conduct was not found where the defendant "did leave the room for 30 to 90 seconds, breaking the chain of causality and giving him the opportunity to reconsider the felonious course of action." *Sellers* was an acknowledged close call, but the defendant checked on the dog and the continuing slumber of the mother to ensure that no noise impeded his overall plan to molest the victim a second and separate time.

***8** Both our Supreme Court and a panel of this court recently reviewed a similar issue of whether separate penetrations constituting rape were unitary or discrete. See *State v. Colston,* 290 Kan. 952, 964, 235 P.3d 1234 (2010) (concluding defendant's act of penile penetration of child victim immediately followed by digital penetration did not constitute multiple acts because "[b]ased on the record, the digital penetration on August 11 did not appear to be factually separate and distinct from the penile penetration on that same date"); *State v. Coffee,* No. 101,608, unpublished Court of Appeals opinion filed September 17, 2010, slip op. at 13 (citing *Colston* and applying *Schoonover* factors to "say with legal certitude that [the defendant's] digital penetration of [the victim] immediately followed by penile penetration [did] not constitute multiple acts" because the conduct occurred within seconds of each other, in the defendant's bedroom, there was no intervening event between the acts of penetration, and the victim's testimony "suggest[ed] that she continually struggled with the defendant throughout both the digital and penile penetration and, therefore, constituted a continuous event involving a single unitary act of *rape* "), *pet. for rev.* filed October 12, 2010 (pending). But see *Foster,* 290 Kan. at 715 (facts presented two separate rapes thereby implicating a multiple acts issue where more than one act of penetration separated in time and by significant intervening events).

Once unitary conduct is found, we must determine if, by statutory definition, there are two offenses or only one. In *Schoonover,* our Supreme Court explained:

> "The determination of the appropriate unit of prosecution is not necessarily dependent upon whether there is a single physical action or a single victim. Rather, *the key is the nature of the conduct proscribed* .... The unit of prosecution [is] determined by the scope of the course of conduct defined by the statute rather than the discrete physical acts making up that course of conduct or the number of victims injured by the conduct." (Emphasis added.) 281 Kan. at 472.

Aguilera was charged with rape as defined by K.S.A. 21–3502(a)(1)(A) as "sexual intercourse with a person who does not consent to the intercourse when the victim is overcome by force or fear."

Instruction No. 8 followed K.S.A. 21–3501(1), stating: "Sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ or any object."

Instruction No. 6 defined the one count of rape as requiring proof that the defendant had sexual intercourse with D.A. by penetrating her vagina with his penis. Instruction No. 7 defined the second count of rape as requiring proof that the defendant had sexual intercourse with D.A. by penetrating her vagina with his finger or fingers.

It is Augilera's position that the unit of prosecution for the rape charges should not be determined by the number of separate acts of penetration, but by the number of separate incidents during which any number of acts of penetration may have occurred. Stated another way, he argues the legislature intended to punish a course of conduct involving vaginal penetration rather than each separate act of vaginal penetration.

***9** Applicable to Aguilera's position is this court's decision in *State v. Mendoza,* 41 Kan.App.2d 996, 207 P.3d 1072 (2009), *rev. denied* 290 Kan. 1100 (2010). The issue in Mendoza was "whether the State can charge two stabs of a knife attack as two distinct counts of aggravated battery." 41 Kan.App.2d at 997. After concluding the aggravated battery

charges arose from the same conduct upon application of the *Schoonover* factors to the facts, this court looked to the language of the aggravated battery statute, K.S.A. 21–3414(a) to determine the unit of prosecution. 41 Kan.App.2d at 1000–04.

The *Mendoza* decision relied on *State v. Gomez,* 36 Kan.App.2d 664, 670–73, 143 P.3d 92 (2006) (criminal discharge of a firearm in violation of K.S.A. 21–4219[b], where it was held the legislature intended to punish a curse of conduct and not that each occupant in a house constituted a separate violation), and *State v.. Thompson,* 287 Kan. 238, 246–52, 200 P.3d (2009) (possession of precursors with intent to manufacture in violation of K.S.A. 65–7006[a], conduct is unitary and defendant cannot be sentenced separately for possession of each prohibited, listed substance).

The *Mendoza* opinion reasoned:

> "The statutory language clearly indicates aggravated battery is inflicted upon another person. The nature of the conduct proscribed appears to encompass all physical harms, disfigurements, and physical contacts inflicted upon the person. [Citation omitted.] ... [T]he statute does not state that harm to each individual body part constitutes a separate violation of the statute. [Citation omitted.] The legislature could have provided this language when enacting K.S.A. 21–3414 but chose not to do so." 41 Kan.App.2d at 1004.

It is Aguilera's argument that analysis of the rape statute requires the same conclusion because the legislature could have, but did not, define rape as any "act" of vaginal penetration. He claims that multiple penetrations occurring at the same place and at the same time in a continuing course of conduct can only be charged or convicted of as one act or a single offense.

The State here did not argue this issue beyond its contention the actions were separate crimes with an intervening event and a fresh impulse. But, the State's unit of prosecution best argument is as follows: Because the legislature defined sexual intercourse in K.S.A. 21–3501(1) as "any penetration of the female sex organ by a finger, the male sex organ, or any object," it intended to punish separately penetration by a finger and penetration by the male sex organ. By using his finger or fingers first and then later his penis, the State claims this involves two separate and distinct actions. Stated another way, the State's position is the legislature clearly defined the unit of prosecution for rape by the object used to complete the penetration.

The ultimate question is whether the legislature intended to publish rape as a course of conduct or based on whether and to what extent a finger, the male sex organ, or any object was used, and possibly how often for the act of penetration.

***10** Neither the statutory structure or the legislative history of the statutory definition of sexual intercourse in K.S.A. 21–3501(1) provides definitive assistance in deciphering the legislative intent on this unit of prosecution question. Accordingly, it is appropriate to apply the rule of lenity. That rule derives from the United States Supreme Court's pronouncement that " '[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity .' " *Schoonover,* 281 Kan. at 472 (quoting *Bell v. United States,* 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 [1955]). Thus, if the legislature fails to authorize a unit of prosecution that ' "clearly and without ambiguity" ' allows two convictions for unitary conduct, the rule of lenity dictates that only one conviction will be allowed. 281 Kan. at 472 (quoting *Bell,* 349 U.S. at 84).

If we are allowed to provide the rule of lenity here, we must conclude that rape is punishable as a course of conduct as opposed to separate individual acts based on what is used to complete the penetration, *i.e.,* a finger or the male sex organ. This would require us to hold Aguilera's rape convictions are multiplicitous and one must be released.

This is not easily done as we are required to follow Kansas Supreme Court precedent. And, there is a 1990 Kansas Supreme Court case which is directly on point and reached a different result from what our *Schoonover* analysis seems to require. *State v. Zamora,* 247 Kan. 684, 693–94, 803 P.2d 568 (1990), which was cited in both *Colston* and *Coffee,* and as late as *Sellers,* held that separate acts of penetration by finger and penis though separated by only a short interval, constituted separate acts of rape. The logic for the majority's holding was that proof of one count required proof of a fact not required in the other "(proof that Zamora inserted his fingers into A.J.'s vagina) ... (proof that Zamora inserted his penis into A.J.'s vagina)." *Zamora,* 247 Kan. at 694.

Zamora was a 4 to 3 decision with a strong dissent by Justice Abbott who noted:

> "This court has long held that '[i]t is a generally accepted principle of law that the state may not split a single offense into separate parts. Where there is a single wrongful act it generally will not furnish the basis for more than one criminal prosecution. [Citations omitted.]'
>
> "K.S.A. 21–3502 lists sexual intercourse as an element of rape. Then, K.S.A. 21–3501 defines the ways in which sexual intercourse may take place. Section 3501 is merely definitional, it does not set forth elements of rape. It is the act of sexual intercourse that is an element of rape, not the insertion of a finger, a penis, or an object." *Zamora,* 247 Kan. at 697.

The dissent contended the trial court erroneously allowed two separate counts of the same offense to go to the jury. The dissenters concluded there was only one act of sexual intercourse and one count was multiplicitous. 247 Kan. at 697–98 (Abbott, J., dissenting, joined by Lockett and Allegrucci, JJ.).

***11** As is apparent, Zamora was decided in 1990 and *Schoonover* in 2006. Under *Schoonover,* we are required to look to the unit of prosecution that is contemplated by the applicable statute. See 281 Kan. at 497–98. That is the test that would have to be applied if the Zamora facts would be decided today, and we believe that a different result would be reached.

We also note that the majority opinion in *Zamora* relied on *State v. Garnes,* 229 Kan. 368, 372–73, 624 P.2d 448 (1981), for the rule that " '[i]f each offense charged requires the proof of a fact not required in proving the other, the offenses do not merge.' " *Zamora,* 247 Kan. at 694. But, this appears to have addressed in *Garnes* circumstances in which offenses based on two different statutes had been charged, not two violations of the same statute. This has the effect of weakening the precedent of Zamora as being required to be followed in our case.

We choose to believe our Supreme Court when the issue is squarely presented to them will follow *State v. Dorsey,* 224 Kan. 152, 156, 578 P.2d 261 (1978), and *Rivera,* 42 Kan.App.2d at 1013–17, and hold that multiple acts of penetration occurring in a continuing or unbroken sequence and in the same location do not give rise to multiple counts of rape. Consequently, we hold that the convictions of two convictions of rape are multiplicitous and one count is reversed.

This is a small victory for Aguilera as the trial court sentenced him to concurrent sentences on the two rape convictions (as well as the aggravated criminal sodomy conviction) so he receives the same sentence as has already been entered. His criminal history is reduced by the reversed rape conviction. There is no reason or requirement for Aguilera to be resentenced.

Aguilera's remaining arguments are without merit. The charging document did not impede his ability to respond to the charges as he now contends.

For a charging document to be complete, it must contain "a plain and concise written statement of the essential facts constituting the crime charged, which complaint, information or indictment, drawn on the language of the statute, shall be deemed sufficient." K.S.A. 22–3201(b).

The amended complaint contained two charges of rape, stating the language of the statute. They alleged Aguilera had sexual intercourse with a person who did not consent and was overcome by force or fear. This is the statutory requirement of K.S.A. 21–3502(a)(1)(A). While the charging document did not distinguish between the two counts of rape, a bill of particulars could have been requested if needed to defend against the charges. It was not error to allow the case to proceed based on the charging document.

There is no multiple acts issue here for as we earlier held that when Aguilera argued his conduct was unitary, he admitted he was not raising a multiple acts issue.

All the convictions except for one rape conviction are affirmed. One rape conviction is reversed. There is no need for Aguilera to be resentenced. The reversed rape conviction is to be removed from Aguilera's criminal history.

***12** Affirmed in part and reversed in part.

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253 P.3d 385 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

George ANTHONY, Appellant,
v.
STATE of Kansas, Appellee.

No. 103,572.
|
June 24, 2011.
|
Review Denied Dec. 2, 2011.

Appeal from Shawnee District Court; Mark S. Braun, judge.

Attorneys and Law Firms

Gerald E. Wells, of Lawrence, for appellant.

Chadwick J. Taylor, district attorney, Natalie Chalmers, assistant district attorney, and Steve Six, attorney general, for appellee.

Before MALONE, P.J., MARQUARDT and LEBEN, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution's Bill of Rights prevent a person from being twice placed in jeopardy at a trial for the same offense. Under this rule, a person may not be tried a second time for the same offense after an acquittal. In addition, when a person is acquitted of one offense, the State may not then try the same person for a related offense if a fact that must be proved for the second offense was necessarily at issue in the case in which the defendant was acquitted. *Yeager v. United States,* 557 U.S. 110129 S.Ct. 2360, 174 L.Ed.2d 78 (2009).

Kansas has also placed this rule in statutory form in K.S.A.2011 Supp. 21–5110(b)(2) (formerly K.S.A. 21–3108[2][b]), which provides that a prosecution is barred if the defendant was previously prosecuted for another crime and that trial ended in an acquittal that ' "required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution.' " *See* *State v. Schroeder,* 279 Kan. 104, 116, 105 P.3d 1237 (2005).

George Anthony contends in this habeas proceeding under K.S.A. 60–1507 that this rule should have barred his murder conviction after a jury had acquitted him of burglary and theft charges in an earlier trial. But under the facts in this case, the person who murdered the victim did not necessarily also commit the burglary and theft. So there was no double-jeopardy bar to trying Anthony again for murder after the burglary and theft acquittal, and the jury's guilty verdict for murder may not be set aside on this basis.

STANDARD OF REVIEW ON APPEAL

When a prisoner files a K.S.A. 60–1507 motion, the prisoner must show that the allegations warrant an evidentiary hearing by providing a factual basis in support of the claims or citing to such facts in the record. *Holt v. State,* 290 Kan. 491, 495, 232 P.3d 848 (2010). If that's done, then the district court should provide an evidentiary hearing unless a review of the full record shows conclusively that the prisoner's allegations have no merit. *Trotter v. State,* 288 Kan. 112, 131–32, 200 P.3d 1236 (2009). The district court in Anthony's case concluded that Anthony hadn't provided a factual basis warranting an evidentiary hearing. In such cases, we review any findings of fact to see whether substantial evidence in the record supports them, and we review the district court's legal conclusions without any required deference. *Rowland v. State,* 289 Kan. 1076, Syl. ¶ 1, 219 P.3d 1212 (2009). Here, the district court made no significant factual findings on the claims Anthony is pursuing on appeal, so we must review independently whether Anthony's claims merited an evidentiary hearing.

FACTUAL BACKGROUND

The State charged Anthony with first-degree murder, aggravated burglary, and theft after David Carrington,

Anthony's on-again, off-again landlord and employer, was killed in Topeka. Anthony was tried three times on the murder charge, with two juries unable to reach a unanimous verdict before the third convicted him. Meanwhile, the second jury had acquitted Anthony of the burglary and theft charges.

***2** The Kansas Supreme Court affirmed Anthony's murder conviction in *State v. Anthony,* 282 Kan. 201, 145 P.3d 1 (2006). We rely primarily upon that opinion to summarize the basic facts of the case; greater details are available in the Supreme Court's opinion.

Carrington's wife found her husband dead on the ground outside their Topeka home at about 9:30 a.m. on a weekday morning. The coroner determined that Carrington had died from damage to his skull and brain caused by multiple blows to the head and neck. Carrington's wife also discovered that she was missing $60 to $80 in $20 bills that had been in her purse, which she kept just inside the open back door to the house.

Soon after the murder, police interviewed Anthony and his girlfriend, Stephanie Brown. Anthony told police that he had been asleep with Brown at the time of the murder. But Brown said that Anthony left her shortly after 5 a.m. and told her he had to go to work. She said that, upon Anthony's return an hour and a half later, he told her not to tell anyone he had left the house; she also noted that he had a new pack of cigarettes and three $20 bills. When confronted by police with Brown's account, Anthony admitted that he had been at Carrington's home and had had an argument with him. Eventually, when an officer said police had the evidence to prove Anthony killed Carrington and that the officer just wanted to know why, Anthony replied, “I don't know. I don't know. I'm not sure. It wasn't intentional. I guess that's it.” Moments later, Anthony added, “After all the years of bullshit I couldn't take it no more.” When the officer asked for the full story, Anthony asked for an attorney, ending the interrogation.

Anthony's comments may have been related to the on-again, off-again relationship he had with Carrington—Anthony had lived in some of Carrington's rental properties, where he sometimes did repair work. But Carrington had evicted him more than once, and the last eviction took place the month before the murder.

DISCUSSION

I. *Anthony Has Shown No Violation of the Double Jeopardy Clause.*

Anthony contends in his K.S.A. 60–1507 motion that trying him a third time for murder—after his acquittal for burglary and theft—violated his double-jeopardy rights. His argument is simple: By finding him not guilty of theft and burglary, the jury must have concluded that he wasn't there. If he wasn't there, he couldn't have committed the murder. Thus, conviction for the murder necessarily required proving a fact —his presence at the murder scene—that had been decided against the State in the second trial.

But the jury's conclusion that the State hadn't proven the theft and burglary charges doesn't mean that jurors had to conclude Anthony wasn't at the murder scene at all. Assuming a theft and burglary occurred, the person who committed that offense had to step *inside* the home, while the murder apparently occurred *outside* the home, where Carrington's body was found. Even if the jury concluded that Anthony didn't step into the home, that doesn't mean he was never outside it, where the murder took place.

***3** As the State points out, the strongest evidence that Anthony was at Carrington's home wasn't the money he allegedly took from the purse—the basis for the theft charge. The strongest evidence was Anthony's own admission that he'd been there.

The jury could have acquitted Anthony on the burglary and theft charges for a variety of reasons. But acquittal on that charge did not, in the words of our statute codifying the part of the double-jeopardy rule relevant to Anthony's case, “require[ ] a determination inconsistent with any fact necessary to a conviction” in the murder case. So there was no double-jeopardy bar to the third trial on the murder charge.

II. *Anthony Has Shown No Other Error by the District Court.*

Anthony has also raised two other issues on appeal. First, he contends that the district court should have allowed him to amend his K.S.A. 60–1507 motion to add a claim that his attorneys had performed below constitutionally required standards in representing him. Second, he contends that we should send the case back for an evidentiary hearing regarding two specific claims that his attorneys work was substandard.

Untimeliness of Claims of Attorney Ineffectiveness

Anthony filed his K.S.A. 60–1507 motion within 1 year of the final, adverse determination of his direct appeal, which is the deadline set by Kansas statute. See K.S.A. 60–1507(f). But his motion to add a claim that his attorneys did a poor job didn't come until more than 9 months after the 1–year deadline. So Anthony could present his new claims of inadequate attorney performance only if one of two circumstances were present: (1) that the filing of the amended motion relates back and can be considered as if it were filed when his original motion was filed; or (2) that failure to meet the 1–year time limit could be excused under the statutory exception when a deadline extension is necessary "to prevent a manifest injustice." K.S.A. 60–1507(f).

Neither circumstance is present here. An amendment to a K.S.A. 60–1507 motion does not "relate back" so that it may be considered as if it had been filed as part of the original motion unless it asserts a new ground for relief supported by facts that do not differ in time or type from those set out in the original motion. *Rice v. State,* 43 Kan.App.2d 428, Syl. ¶ 3, 225 P.3d 1200 (2010). With one exception, Anthony didn't provide any factual claims of subpar attorney performance in his original K.S.A. 60–1507 motion; his sole claim then was that his attorney ignored his requests to add claims. But this reference presumably refers to the claims Anthony identified in his motion in response to the instruction to state concisely *all* of the grounds on which he based his claim of unlawful imprisonment—and nowhere in those statements does he mention any specific failing by any of his attorneys.

Nor has Anthony shown any manifest injustice in our refusal to allow him to present these claims at this time. In Anthony's motion to amend, filed well after the 1–year deadline, Anthony still provided no facts and no specifics about any claim of poor attorney performance; he merely said that he "requests the opportunity to file an amended petition adding allegations of ineffective assistance of counsel."

***4** We recognize that Anthony's appointed counsel for the K.S.A. 60–1507 motion apparently didn't learn of her appointment right away. But the attorney who filed Anthony's motion to amend entered a formal entry of appearance more than 2 months before filing that motion, and the motion neither provided any factual support for a claim of ineffective assistance of counsel nor for a claim of manifest injustice.

Inadequacy of Anthony's Claims of Attorney Ineffectiveness

On appeal, Anthony has for the first time attempted to provide some factual support for a claim that his attorneys failed him. Generally we do not consider ineffective-assistance-of-counsel claims that are first presented on appeal. *Alford v. State,* 42 Kan.App.2d 392, 394, 212 P.3d 250 (2009), *rev. denied* 290 Kan. 1092 (2010). We may do so in extraordinary circumstances when there are no factual issues and the test for subpar attorney performance can be applied as a matter of law. *Trotter,* 288 Kan. 112, Syl. ¶ 11. But that's not true for either of the claims Anthony has raised; nor do either of the claims have any apparent merit based on our record.

Anthony claims that the record clearly shows inadequate assistance. His first such claim is based on a statement made by an attorney initially appointed to represent him on appeal in the K.S.A. 60–1507 proceeding. That attorney, with the Appellate Defender Office, sought to withdraw because Anthony wanted to argue that his attorney in his direct appeal had been ineffective—but the Appellate Defender Office represented Anthony in that appeal as well. Obviously, the Appellate Defender Office would have a conflict of interest in having to consider whether to argue that its own attorneys provided substandard representation. Anthony claims that the Appellate Defender Office admitted it had been ineffective when the withdrawing attorney noted that some of the issues Anthony was raising "are ones that could have been [made] on the earlier direct appeal" and the office "would have to argue its own ineffectiveness" if it were to represent Anthony in the K.S.A. 60–1507 appeal. Contrary to Anthony's argument before us, those statements did not admit any inadequate representation—the motion said these were claims that *could* have been made in the direct appeal, not ones that were so compelling that they *should* have been made.

Anthony's second claim is that the record already shows ineffective assistance by his attorney's failure to make one argument in support of his manifest-injustice claim. Anthony notes on appeal that he had made general comments that his first attorney(s) had failed to add some claims at his request, and he suggests that, had this been pointed out, the district court might have found manifest injustice. But as we have already noted, Anthony provided no factual information in support of that claim in either his initial motion or in his motion to amend. Nor has he provided additional factual support in his appellate brief. This is not a case in which our record discloses both that an attorney's work was clearly below standard and that poor representation adversely affected the defendant. We therefore cannot consider these

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claims of substandard attorney performance, which have been raised for the first time on appeal.

***5** The judgment of the district court, which dismissed Anthony's K.S .A. 60–1507 motion, is therefore affirmed.

All Citations

253 P.3d 385 (Table), 2011 WL 2555421

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